

TRANSCRIPT OF RECORD

Supreme Court of the United States

NOTICE OF THE COURT

No. 178

THE SUPREME COURT OF THE UNITED STATES

OF THE UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE UNITED STATES  
AT THE CITY OF WASHINGTON  
ON THE 17TH DAY OF OCTOBER 1901

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 178

J. BAKER BRYAN, SR., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

No. 7734-J. 26 U. S. C., 145(b); (Internal Revenue Code)

UNITED STATES OF AMERICA,

against

J. BAKER BRYAN, SR.

The grand jury charges:

That on or about the 16th day of March, 1942, in the Southern District of Florida, and within the jurisdiction [fol. 2] of this Court, J. Baker Bryan, Sr., late of Jacksonville, who during the calendar year of 1941 was married and had three dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1941 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Florida, at Jacksonville, a false and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of \$3,869.50 and that the amount of tax due and owing thereon was the sum of \$104.95, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$14,374.17, upon which said net income he owed the United States of America an income tax of \$2,193.51.

**Second Count**

The grand jury further charges:

That on or about the 14th day of March, 1943, in the Southern District of Florida, and within the jurisdiction of this Court, J. Baker Bryan, Sr., late of Jacksonville, who during the calendar year 1942 was married and had three dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year of 1942 by filing, and causing to be filed with the Collector of Internal Revenue for the Internal Revenue

nue Collection District of Florida, at Jacksonville, a false [fol. 3] and fraudulent income tax return wherein he stated that his net income for said calendar year was the sum of \$4,476.35 and that the amount of tax due and owing thereon was the sum of \$405, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$15,514.74, upon which said net income he owed to the United States of America an income tax of \$3,882.58.

### Third Count

The grand jury further charges:

That on or about the 15th day of March, 1944, in the Southern District of Florida, and within the jurisdiction of this Court, J. Baker Bryan, Sr., late of Jacksonville; who during the calendar year 1943 was married and had two dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Florida, at Jacksonville, a false and fraudulent tax return wherein he stated that his net income for said calendar year was the sum of \$1,814.67 and that the amount of tax due and owing thereon was the sum of \$39.44, whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$23,283.62, upon which said net income he owed to the United States of America a tax of \$8,527.52.

[fol. 4]

### Fourth Count

The grand jury further charges:

That on or about the 15th day of March, 1945, in the Southern District of Florida, and within the jurisdiction of this Court, J. Baker Bryan, Sr., late of Jacksonville, who during the calendar year 1944 was married and had two dependents, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1944 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Florida, at Jacksonville, a false and fraudulent income tax return wherein he stated that



his net income for said calendar year was the sum of \$7,127.34 and that the amount of tax due and owing thereon was the sum of \$1,316.93, whereas, as he then and there well knew his net income for the said calendar year was the sum of \$88,634.75, upon which said net income he owed to the United States of America an income tax of \$58,422.23.

A True Bill.

(S.) L. P. Holton, Foreman.

(S.) Arthur A. Simpson, Assistant United States Attorney.

(Endorsed on back:)

Indictment. Vio.: Income tax evasion 26 USC 145 (b).  
A true bill, (S.) L. P. Holton, Foreman.

[fol. 5] Filed in open court this 13th day of May, A. D., 1947.

(S.) Edwin R. Williams, Clerk.

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MINUTE BOOK No. 47

Monday, June 2, A. D., 1947, at Jacksonville, Florida.

Present: His Honor Louie W. Strum, and his Honor Dozier A. DeVane, District Judges presiding, Court Officials and Bailiff in Attendance.

Court is opened by due proclamation.

Judge DeVane presiding.

7734-J-Cr. Vio: Income Tax

UNITED STATES OF AMERICA,

vs.

J. BAKER BYRAN, SR.

Comes now Damon G. Yerkes, Assistant District Attorney, who prosecutes for the United States of America, comes also the Defendant, J. Baker Bryan, Sr., in proper person, attended by Counsel, John Muskoff and Alston Cockrell, whereupon

The defendant having been furnished with a copy of the Indictment pending against him, and being now arraigned in open Court upon said Indictment, pleads not guilty.

It is ordered that this case be continued until the October term for trial.

[Caption omitted]

The defendant moves for an order requiring that he be furnished with a bill of particulars showing wherein it is claimed that the returns which are the basis of the indictment are false and fraudulent.

On that behalf defendant shows the indictment in each of its counts sets forth the net income returned by the defendant and the amount of tax shown by the return to be due and sets forth a much larger amount as the true net income of the defendant and a much larger sum as the actual amount of tax owed by him but does not show any particulars as to wherein the net income as shown in the returns was false. It does not show whether the gross income is claimed to have been understated or whether the deductions from the gross to make the net are claimed to have been overstated. The returns were all made in detail showing income from certain sources and no income from other sources and deductions from certain sources. For example, the defendant's income tax returns show that he received no salaries or other compensation for personal services. If the government intends to attempt to prove that he did receive salaries or other compensation for personal services, the defendant should be so informed and should be informed of the sources of income for such personal services in order to be prepared to defend against such claim. As to items in the income tax returns of net [fol. 7] profit or loss from business or profession, the defendant showed in his returns in detail his gains and losses. If the government intends to attempt to prove that the details which the defendant showed on his returns as to the businesses which he reported are incorrect, he should be so advised. Or if the government intends to attempt to show that he made money from undisclosed businesses, he should be so advised.

Defendant's counsel have called on the U. S. Attorney for particulars and the U. S. Attorney has declined to furnish any. Defendant cannot safely prepare for trial without knowing the particulars as to what will be attempted to be proved against him.

Wherefore defendant moves that the government be required to furnish him a bill of particulars showing the following matters severally:

a. If any of the deductions shown in the returns are claimed to be false, as to which of said deductions such claim is made.

b. In what particulars such deductions are claimed to be false.

c. If the statements or any thereof as to gross income in the returns are claimed to be false, which are claimed to be false.

d. In what particulars are said statements claimed to be false.

[fol. 8] e. If it be claimed that defendant received income from sources other than those shown in the returns, the sources of such income.

f. The approximate times when and amounts which defendant is claimed to have received income from such sources severally.

g. Particulars which will give defendant sufficient information to enable him to identify the fraudulent and false statements charged against him and to be prepared to meet such claims.

(S.) Alston Cockrell, John W. Muskoff, Attorneys  
for Defendant.

Received a copy of the foregoing this the 23rd day of  
December, 1947.

(S.) Edith House, Asst. U. S. Attorney.

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MOTION—Filed February 24, 1948

(Caption Omitted)

Comes now the defendant in the above entitled cause by his undersigned attorneys and shows unto the Court as follows:

At the time the plea was entered in said cause neither the defendant's counsel nor his auditors had had an op-  
[fol. 9] portunity to check into defendant's books and into

the charges made in the indictment. Since said plea defendant's counsel has had time to consider the charges against the defendant and to have checked his books. A fair trial of said cause cannot be had without a bill of particulars and the pleadings are so framed so as to prejudice, embarrass and delay a fair trial.

Defendant moves the Court that he be allowed to withdraw his plea for the purpose of filing motion, copy of which is hereto attached, and a copy thereof having been given the U. S. Attorney.

(S.) Alston Cockrell, John W. Muskoff, Attorneys  
for Defendant.

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ORDER ON MOTION FOR BILL OF PARTICULARS—Filed March  
5, 1948

(Caption omitted)

This case came on to be heard on the motion of the defendant to require the Government to furnish a bill of particulars and after argument of counsel and due consideration, the Court is of the opinion that the motion should be granted in part and denied in part.

It Is Therefore Considered, Ordered and Adjudged by the Court that the District Attorney furnish the defendant's attorney, on or before March 8, 1948, a bill of particulars showing a reasonable particularity the information demanded in subparagraphs a to f, both inclusive.

It Is Further Ordered that the prayer for bill of particulars in subparagraph g, be and the same is hereby denied.

Done and Ordered at Jacksonville, Florida, March 5, 1948.

(S.) Alexander Akerman, U. S. District Judge.

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BILL OF PARTICULARS—Filed March 8, 1948

(Caption omitted)

Pursuant to order of this Honorable Court made and entered on the 5th day of March, 1948, the United States of America files this, its bill of particulars:

Answering Paragraph a of the motion for bill of particulars, as required in said order, the United States says



that "No deductions are claimed to be false, however, the depreciation claimed for the year 1941 was reduced due to technical adjustments."

[fol. 11] Answering Paragraph b of the motion for bill of particulars, as required in said order, the United States says that "None claimed to be false."

Answering Paragraph c of the motion for bill of particulars, as required in said order, the United States says "The gross income for each of the years covered by the indictment is understated."

Answering Paragraph d of the motion for bill of particulars, as required in said order, the United States says "The gross income from business and gambling is understated."

Answering Paragraph e of the motion for bill of particulars, as required in said order, the United States says "No income is claimed to have been received from any sources other than those shown on the returns filed."

And finally, answering Paragraph f of the motion for bill of particulars, as required in said order, the United States says "None alleged to have been received from sources other than those shown in the returns filed."

(S.) Damon G. Yerkes, Assistant United States Attorney.

[fol. 12] MOTION FOR BETTER BILL OF PARTICULARS—Filed  
March 10, 1948

(Caption omitted)

Comes now the defendant, J. Baker Bryan, Sr., by his undersigned attorneys and files this his motion for a better bill of particulars and shows unto the Court as follows:

That on to wit the 5th day of March, A. D., 1948, this Court granted defendant's motion for bill of particulars as to the matters set forth in Paragraphs a to f, both inclusive, of the motion for bill of particulars, the order requiring reasonable particularity.

As to Paragraphs c and d the so called bill of particulars utterly fails to show which statements as to gross

income in the returns are claimed to be false or in what particulars such statements are claimed to be false. As to said Paragraphs c and d there is no more information contained in the so called bill of particulars than there is in the indictment.

Wherefore, defendant prays that the United States of America be required to comply with said order of this Court as to Paragraphs c and d of the motion and show which statements as to gross income in the returns are claimed to be false and in what particulars such statements are claimed to be false.

(S.) Alston Cockrell, John W. Muskoff, Attorneys for Defendant. 1105 Graham Bldg, Jacksonville, Fla.

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[fol. 13] ORDER ON MOTION FOR BETTER BILL OF PARTICULARS  
—Filed March 10, 1948

[Caption Omitted]

This cause coming on to be heard upon defendant's motion for a better bill of particulars, and it appearing to the Court that the plaintiff has failed to comply with the order of this Court, dated March 5, 1948, it is—

Further Ordered and Decreed that the plaintiff be required to furnish defendant a statement of any gross income alleged to be false, approximate dates it was received, from what sources it was received, and the amounts thereof.

Plaintiff shall have two days in which to furnish said bill of particulars.

Done and Ordered at Jacksonville, Florida, March 10, 1948.

(S.) Alexander Akerman, U. S. District Judge.

[fol. 14] BILL OF PARTICULARS—Filed March 12, 1948

[Caption Omitted]

Pursuant to an order of this Honorable Court made and entered on the 10th day of March, 1948, the United States files this, its bill of particulars:

The business gross receipts are alleged to be understated in the amount of not less than \$9,036.81 for the year 1941;

The business gross receipts are alleged to be understated in the amount of not less than \$11,038.39 for the year 1942;

The business gross receipts are alleged to be understated in the amount of not less than \$21,468.95 for the year 1943; and

The business gross receipts are alleged to be understated in the amount of not less than \$81,507.41 for the year 1944.

The unreported gross receipts were not reflected in the records made available by the defendant and the plaintiff does not know the approximate dates such unreported gross receipts were received by the defendant, nor the amounts received from each source.

(S.) Damon G. Yerkes, Assistant United States Attorney.

[fol. 15] Received a copy of the above and foregoing bill of particulars at 4:30 P. M. this 12th day of March, 1948.

(S.) John W. Muskoff, Attorney for Defendant.

MOTION FOR BETTER BILL OF PARTICULARS—Filed March 13, 1948

(Caption omitted)

Comes now the defendant in the above entitled cause and moves the Court for a better bill of particulars and in this behalf shows unto the Court as follows:

1. That the plaintiff has failed to file a bill of particulars as required by the order of this Court dated the 5th day of March, 1948.

2. That the plaintiff has failed to file a better bill of particulars as required by the order of this Court dated the 10th day of March, 1948.

3. That the bill of particulars which was purported to be furnished pursuant to the order of March 10, 1948, gives no information not contained in the indictment and the first bill of particulars, whereas the order of March 10, 1948, requires the plaintiff to furnish the defendant a statement of any gross income alleged to be false, approximate dates it was received and from what sources it was received and the amounts thereof. Plaintiff merely names [fol. 16] a lump sum for each count and states that the unreported gross receipts were not reported in any records made available by the defendant. The bill of particulars utterly fails to show the sources and it is not contended by the plaintiff it does not know the sources. The bill of particulars utterly fails to give the defendant any information by which he can fairly prepare his defense as required by law. The bill of particulars shows that the government claims that there was unreported income not reflected in the records of the defendant made available to plaintiff, thereby showing that plaintiff claims that there was unreported income, the particulars of which it is fully aware but has withheld, in defiance of the orders of the Court heretofore made.

(S.) John W. Muskoff, 1105 Graham Bldg., Jacksonville, Fla., Attorney for Defendant.

Received copy of above motion for better bill of particulars on the 13 day of March, A. D., 1948.

(S.) H. S. Phillips.

MOTION TO DISMISS—Filed March 13, 1948

(Caption omitted)

Comes now the defendant by his undersigned attorneys and files this his motion to dismiss the indictment and [fol. 17] each count thereof severally and shows unto the Court that the indictment and each count thereof severally is bad in substance and in law, the substantial matters in laws to be argued:

1. The indictment fails to charge any offense under the laws of the United States.



2. The indictment fails to charge any offense under the regulations of any department or bureau of the United States.

3. The indictment and each count thereof severally fails to adequately inform the defendant of just what he was alleged to have wrongfully done.

4. The indictment and each count thereof severally fails to show in what manner the defendant attempted to evade or defeat any tax imposed by law.

5. The indictment and each count thereof severally fails to allege that the defendant willfully filed, made or subscribed to a return which he did not believe to be true and correct as to every material matter.

6. The indictment is wholly inadequate when tested by the rules of common law or by the laws and rules of the United States.

[fol. 18] 7. The indictment shows on its face Counts one and two are barred by the statute of limitations.

(S.) John W. Muskoff, Attorney for Defendant,  
1105 Graham Bldg., Jacksonville, Fla.

Received copy of the above motion on the 13 day of March, 1948.

(S.) H. S. Phillips.

MOTION FOR ACQUITTAL AND IN THE ALTERNATIVE FOR NEW TRIAL—Filed July 14, 1948

[Caption omitted]

The defendant hereby renews his motion for judgment of acquittal made at the close of all the evidence, and in the alternative moves the Court to grant him a new trial, for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

2. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

3. The verdict is contrary to the weight of the evidence.  
[fol. 19] 4. The verdict is not supported by substantial evidence.

5. The Court erred in permitting in evidence the audit of the witness E. J. Marquis, Jr., Government's Exhibit No. 38.

6. The Court erred in permitting evidence by the witness Marquis of checks made by Evelyn Bryan, Government's Exhibit No. 39.

7. The Court erred in permitting evidence with reference to the purchases for the "Showboat" not shown to have been made by the defendant.

8. The Court erred in permitting testimony of the witness Marquis with reference to \$9,000.00 valuation in a trade for the Seminole Club.

9. The Court erred in ruling as follows: "If this were a suit on an account, the objection would be good. This is not such a suit as that, and the income tax people have to do the best job they can in a case like this, and the Court and the jury and the counsel and the defendant have to put up with it."

10. The Court erred in refusing to permit defendant to cross-examine the witness Marquis with reference to sales made by the defendant prior to 1941.

11. The Court erred in not permitting the defendant to cross-examine the Government witness Marquis with reference to cash obtained by sales of real estate and other property prior to January 1, 1941, which would have accounted for much more money than the Government's witness gave the defendant Bryan credit for having on January 1, 1941.

12. The Court erred in not permitting the defendant to cross-examine the Government witness Marquis with reference to moneys of the defendant on and prior to January 1, 1941, other than shown by a checking account.

13. The Court erred in stating in the presence of the jury that the plate glass mirrors were considered a capital asset under the Internal Revenue regulations.

14. The Court erred in ruling in the presence of the jury as follows: "He has regulations in doing it. Under the Internal Revenue regulations it is classified as a capital asset. If they are wrong in their classifications you and I will have to get them to correct it."

15. The Court erred in permitting Government counsel to argue to the jury, over the objections of the defendant, that they knew if the defendant had any money other than in the bank he would have made a statement to the income tax authorities to that effect.

16. The Court erred in permitting Government counsel to argue to the jury, over the objection of the defendant, that the defendant did not disclose to the income tax officers who examined him that he had any money other than that shown by the bank account.

[fol 21] 17. The Court erred in permitting the Government attorney to berate the defendant in his argument before the jury for not making disclosures to the Government agents.

18. The indictment does not state facts sufficient to constitute an offense against the United States.

19. The Court erred in denying the defendant's motion for a better bill of particulars, filed on to wit the 13th day of March, 1949.

20. The Court erred in not granting defendant's motion to dismiss the indictment.

21. The Court erred in discharging one of the members of the jury and continuing the trial with only eleven on the jury, there being no stipulation in writing that the jury shall consist of less than 12, the defendant himself not having consented thereto, the only consent thereto being the oral agreement of Government and defendant's attorneys.

(S.) Alston Cockrell, John W. Muskoff, Attorneys  
for Defendant. 1105 Graham Bldg., Jacksonville,  
Fla.

Received a copy of this the 19th day of July, A. D. 1948.

(S.) Damon G. Yerkes, Asst. U. S. Attorney.

[fol. 22] MOTION IN ARREST OF JUDGMENT—Filed July 14, 1948

(Caption omitted)

The defendant moves the Court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The defendant was convicted by a jury of less than 12. There was no stipulation in writing before verdict that the jury shall consist of less than 12. There was no consent by defendant, the only consent being by oral agreement of Government and defense attorneys.

3. The Court erred in denying the defendant's motion for a better bill of particulars, filed on to wit the 13th day of March, 1948.

4. The Court erred in not granting defendant's motion to dismiss the indictment.

(S.) Alston Cockrell, John W. Muskoff, Attorneys for Defendant. 1105 Graham Bldg., Jacksonville, Fla.

Received a copy this the 14th day of July, A. D., 1948.

(S.) Damon G. Yerkes, Asst. U. S. Attorney.

[fol. 23] ORDER DENYING MOTION IN ARREST OF JUDGMENT AND MOTION FOR ACQUITTAL AND IN THE ALTERNATIVE FOR NEW TRIAL—Filed July 15, 1948

[Caption omitted]

This cause coming on to be heard upon defendant's Motion in arrest of Judgment and further on defendant's Motion for Acquittal and in the alternative for a new trial, and argument of counsel having been heard and the matter considered by the Court, it is thereupon

Ordered and Adjudged that said Motion in Arrest of Judgment be and the same is hereby denied, and it is

Further Ordered and Adjudged that said Motion for Acquittal and in the alternative for a New Trial be and the same is hereby denied.



Done and Ordered at Jacksonville, Florida, this 15th day of July, 1948.

(S.) Dozier A. DeVane, United States District Judge.

[fol. 24] NOTICE OF APPEAL—Filed July 15, 1948

[Caption omitted]

Name and address of appellant: J. Baker Bryan, Sr., 7830 Laura Street, Jacksonville 8, Florida.

Name and address of appellant's attorneys: John W. Muskoff, Alston Cockrell, 1105 Graham Building, Jacksonville 1, Florida.

**Offense:**

1. The defendant was charged by indictment with having violated Section 145, Title 26, U. S. Code, Annotated, in four counts, each count being for a specific year, the years being 1941, 1942, 1943 and 1944.

2. The verdict of guilty was returned by the jury on Count 3 referring to the year 1943 and on Count 4 referring to the year 1944.

3. The nature of the offense charged was an attempt by defendant to evade a large portion of his income tax for the above years.

4. The jury's verdict was returned on July 9, 1948. On July 9, 1948, the Court found defendant guilty and sentenced him to two years in the custody of the Attorney General of the United States on Count 3 and \$10,000.00 fine on Count 4.

[fol. 25] I, the above-named appellant hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the above judgment.

This the 15th day of July, 1948.

(S.) Alston Cockrell, John W. Muskoff, Attorneys for Appellant, 1105 Graham Bldg., Jacksonville, Florida.

**MOTION FOR SUPERSEDEAS BOND—Filed July 15, 1948**

[Caption omitted]

Defendant shows that he has duly entered his appeal from the sentence and conviction herein, and prays that he be released on bail pending said appeal. Defendant elects not to commence service of the sentence.

Defendant further prays that the sentence to pay a fine be stayed pending appeal.

Defendant shows that this case involves substantial questions which should be determined by the Appellate Court, many of the questions involved being shown in the motion for new trial filed in this cause.

(S.) Alston Cockrell, John W. Muskoff, Attorneys  
for Defendant, 1105 Graham Bldg., Jacksonville,  
Fla.

[fol. 26]

**ORDER—Filed July 15, 1948**

[Caption omitted]

The motion of the defendant for a stay of execution pending appeal having been considered, and it appearing that the case involves a substantial question which should be determined by the Appellate Court, said motion is granted and the sentence of imprisonment and fine is stayed and the defendant is admitted to bail upon the defendant's filing with the Clerk of this Court a satisfactory bond in the sum of Ten Thousand Dollars conditioned as provided by law to be approved by said Clerk.

Done and ordered this 15th day of July, A. D., 1948.

(S.) Dozier A. DeVane, Judge.

## MINUTE BOOK No. 48

Tuesday, July 6, A. D., 1948, at Jacksonville, Florida

Present: His Honor Louie W. Strum and Dozier A. DeVane. Court Officials and Bailiff in Attendance. Court is opened at 10 A. M. by due proclamation.

Hon. Dozier A. DeVane, presiding.

7734-J-Cr.

UNITED STATES OF AMERICA

vs.

J. BAKER BRYAN, SR.

[fol. 27] Comes now Damon Yerkes, Assistant District Attorney, who prosecutes for the United States of America, comes also the Defendant, J. Baker Bryan, Sr., in his own proper person, attended by counsel, Alston Cockrell and John W. Muskoff, whereupon

Both sides announcing ready for trial the following jury is impanelled and sworn, according to law, to try the issues herein, to-wit:

Stuart P. Emmert, John R. Durrett, Guy W. Luke, Edwin H. Vrieze, Horace A. Pillars, A. Rice King, Bert M. Hooper, J. Victor Talley, Alex B. Campbell, Jr., James S. Dickinson, Roland D. Baldwin, Burdette Garrison.

And now the remaining jurors are excused to 10 A. M. Thursday, July 8, 1948.

To maintain the issues herein on behalf of the Government, Louis Gravely and Grace W. Raleigh are sworn and testify as witnesses.

Government's exhibits numbers 1, 2, 3 and 4 are filed in evidence.

At this point juror Guy W. Luke is excused because of illness in his family from further consideration of this cause, and by consent of counsel for both the Government and the Defendant the trial of this cause shall proceed to verdict with eleven jurors. Juror Guy W. Luke is excused to Thursday, July 8, 1948, at 10 A. M.

[fol. 28] To maintain the issues herein in behalf of the Government, Charles M. Stokes, Jr., George W. Hess, W. D. Rumbaugh, A. W. Hoover, John T. G. Crawford and Wil-

bur W. Sasser are sworn and testify as witnesses. Government's exhibit No. 6 is filed in evidence. Government's exhibits Nos. 7, 8 and 9 filed in evidence. And to maintain the issues herein in behalf of the Government, Harold Lingo, Miller R. Askins, Joseph M. Askins, Robert W. Askins, Herbert W. Fischler, Mrs. Caroline Frances and Paul F. Hoffman, are sworn and testify as witnesses.

And now the hour for recess having arrived, the jury is cautioned as to its conduct and allowed to separate until 10 A. M. tomorrow, January 8, 1948.

#### MINUTE BOOK No. 48

Wednesday, July 7, A. D., 1948, at Jacksonville, Florida.  
Present: His Honor Louie W. Strum and Dozier A. DeVane. Court officials and bailiff in attendance. Court is opened at 10 A. M. by due proclamation.

7734-J-Cr.

UNITED STATES OF AMERICA,

*vs.*

J. BAKER BRYAN, SR.

Hon. Dozier A. DeVane, presiding.

All parties to this cause being present and the jury heretofore impanelled and sworn being in their places, trial of this cause is resumed.

To further maintain the issues on behalf of the Plaintiff, George Holland, M. H. Dawson, Louis Bono, Glenn C. Monroe, Jr., M. T. Vickers, J. W. Harrell, Walter B. [fol. 29] Denson, George W. Clark, Homer C. Reed, Walter Y. Laing, Sr., Robert W. Brack, James M. Shields, David W. Shaffer, Will O. Murrell, Frank O. Miller, Jr., Robert C. Lechner, Bennie Fletcher, Lorenzo K. Miller, James L. Ingram, Robert L. Cobb, Edgar S. Hamon, Lynnwood Jefferies, Earl Henry Thompson, Julius E. McQuaig, Ann Bostick, James B. Holmes, J. D. Ivey, R. F. S. Harmon, M. B. Bishop, Mrs. Best C. Russell, Conrad Mahaffy, Kingsley A. McCallum, Ike Witten and Edgar N. Felson, are sworn and testify as witnesses.



Government's exhibits 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35 and 36 are filed in evidence.

And now the hour for recess having arrived, the jury is cautioned as to its conduct and allowed to separate until 10 A. M. tomorrow.

### MINUTE BOOK No. 48

Thursday, July 8, A. D., 1948, at Jacksonville, Florida.

Present: His Honor Louie W. Strum and Dozier A. DeVane. Court officials and bailiff in attendance. Court is opened at 10 A. M. by due proclamation.

7734-J-Cr.

UNITED STATES OF AMERICA

VS.

J. BAKER BRYAN, SR.

Hon. Dozier A. DeVane, presiding.

All parties to this cause being present and the jury heretofore impanelled and sworn being in their places, trial of this cause is resumed from July 7, 1948.

[fol. 30] To further maintain the issues on behalf of the Plaintiff, E. J. Marquis, Jr., is sworn and testifies.

Government's Exhibits 38 and 39 are filed in evidence.

Government rests.

And now the defendant moves the Court for a judgment of acquittal, which motion is denied.

To further maintain the issues on behalf of the Defendant, Mrs. Evelyn Bryan is sworn and testifies.

Defendant rests.

Both sides close.

And now the defendant renews his motion for judgment of acquittal, which motion is again denied.

And now the Jury having heard the argument of counsel for both the Government and the Defendant, and the hour for recess of the Court having arrived, the jury is cautioned as to its conduct and allowed to separate until 10 A. M. tomorrow, July 9, 1948.

[fol. 31]

## MINUTE BOOK No. 48

Friday, July 9, A. D., 1948, at Jacksonville, Florida.

Present: His Honor Louie W. Strum and Dozier A. DeVane. Court officials and bailiff in attendance. Court is opened at 10 A. M. by due proclamation.

Hon. Dozier A. DeVane, presiding.

7734-J-Cr.

UNITED STATES OF AMERICA

VS.

J. BAKER BRYAN, SR.

Damon G. Yerkes, John Muskoff and Alston Cockrell.

All parties to this cause being present and the jury heretofore impanelled and sworn being in their places, trial of this cause is resumed from July 8, 1948.

And now the Jury having heard the charge of the Court retires under the charge of the Court to consider of their verdict.

The jury returns for further instructions at 12:10 noon and retires at 12:15.

And now the Jury returns at 12:50 and are allowed to separate for lunch, to report back in the Jury Room at 2 P. M.

[fol. 32] "UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF FLORIDA

7734-J-Cr.

UNITED STATES OF AMERICA

VS.

J. BAKER BRYAN, SR.

Verdict

Jacksonville, Florida, June 9th, 1948.

We, the Jury, find the defendant, J. Baker Bryan, Sr., guilty as charged in Counts three (3) and four (4) in the Indictment.

So say we all.

(S.) Roland D. Baldwin, Foreman."

## TRANSCRIPT OF TESTIMONY—Filed July 30, 1948

[Title omitted]

Jacksonville, Florida, July 6, 1948.

Before: DeVane, J. and a Jury.

## APPEARANCES:

Damon Yerkes, Assistant United States Attorney, for the United States;

John W. Muskoff, Esquire, and Alston Cockrell, Esquire, of the law firm of Cockrell & Cockrell, Jacksonville, Florida, attorneys for the Defendant.

Mr. Muskoff:

If your Honor please, there was a motion granted for a bill of particulars and another motion granted for a better [fol. 33] bill of particulars. The Judge who was here the last time, of his own motion filed a motion for a better bill of particulars. We argued it and the Judge indicated that he would overrule the motion for a bill of particulars and continued it of his own motion. He didn't have time to try it. There has never been an order entered that I have seen.

The Court: I will enter an order denying the motion. It is on my calendar for trial.

(Whereupon, counsel asked leave to have a conference with Judge Strum, which request was granted and a recess was had. Upon counsel's return to the Courtroom it was announced that Judge Strum would enter an order nunc pro tunc denying the motions for better bill of particulars and bill of particulars.)

(Whereupon, the case proceeded to trial, as follows:)

(A Jury of twelve men was duly impanelled, and the following proceedings were had:)

(Whereupon, in the course of the examination of the Jury by counsel for the defendant, the following question was asked the Jury by Mr. Cockrell:)

Mr. Cockrell: Gentlemen of the Jury, it may appear, and probably will appear, that in some years Mr. Bryan did not return fair, proper income tax returns. My memory is that

[fol. 34] bootleggers very rarely returned proper income tax returns showing their bootlegging profits until after Al Capone was captured for his violation for income taxes. Now, the Court, I think, will charge you that you must be convinced beyond and to the exclusion of every reasonable doubt that the defendant here is guilty of the particular charges made against him; that is to say, the fraudulent evasion of the payment of income taxes in certain specific years. If the testimony should leave you doubtful as to what the evasions were in the particular years that he is charged with having evaded the return, or whether he may have done it at some time in the past, would you give him the benefit of that doubt and acquit him, if the Court should charge you that he is entitled to the benefit of the doubt?

Mr. Yerkes: I think that is a long and involved question and getting right down to the question that the Court is going to charge on. I don't think that is a proper question at this time.

The Court: Gentlemen of the Jury, I will instruct you that notwithstanding this indictment it is necessary that the Government prove beyond a reasonable doubt the guilt of this defendant before you can convict him. He comes into this Court clothed with the presumption of innocence and that presumption remains with him unless and until the Government has shown his guilt beyond a reasonable doubt.

[fol. 35] Mr. Cockrell: The particular point that I was getting at is, if there should be doubt as to the years that there may have been evasion, assuming that there was evasion back in the bootlegging years.

The Court: The proof must show that he committed the offense in the years he is charged with having committed them. We are not going to try him on any other evasion, just on this indictment.

(Whereupon, the examination of the Jury having been completed, the Jury was tendered by the Government and accepted by the defendant, and the following proceedings were had:)

The Court: Unless you gentlemen will at this time agree to submit this case to a jury with ten or more jurors, in case one or two of them should get ill, I am going to select a couple of alternates. If you will each agree that if as many as two of this panel become ill and be excused on that account that we will let the case go on to final conclusion



with the remaining jurors, I will not select alternate jurors.

Mr. Yerkes: I am perfectly willing to proceed in that manner.

Mr. Cockrell: We agree to go on in that way.

[fol. 36] The Court: All right; we will not have to select alternates.

(Whereupon, the Jury was duly sworn.)

The Court: Do you gentlemen desire the Rule invoked?

Mr. Cockrell: Yes, your Honor.

(Whereupon, the witnesses who were present were called into the courtroom and duly sworn, and the following proceedings were had:)

The Court: Now, ladies and gentlemen, the Rule has been invoked, which means that it is necessary for you to remain outside of the courtroom while the case is being heard. I desire that you remain close by so you can answer promptly when your name is called. You are not to discuss this case with one another while you are outside, and particularly are you not to tell anybody what went on in the courtroom while you were on the witness stand. You may, of course, talk to counsel who brought you here as a witness.

(Whereupon, Mr. Yerkes announced that he would like to excuse two Government witnesses from the Rule, and the following proceedings were had:)

[fol. 37] Mr. Muskoff: I would like to accommodate him, but I don't think it would be a fair trial. I would rather that he abide by the Rule as well as the others.

The Court: I will only excuse one Government witness from the Rule.

(Whereupon, the witnesses withdrew from the courtroom, with the exception of one Government witness who was excused from the Rule, and the following proceedings were had:)

(An opening statement was made to the Jury by Mr. Yerkes, on behalf of the United States.)

(An opening statement was made to the Jury by Mr. Muskoff on behalf of the Defendant.)

(Whereupon, the following proceedings were had:)

LOUIS GRAVELY was called as a witness on behalf of the United States, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Louis Gravelly, Jr.

Q. What official position do you hold with the United States Government?

[fol. 38] A. I am in the Chief Comptroller's Division, Office of Collector of Internal Revenue, Jacksonville, Florida.

Q. Holding such position, are you custodian of certain files in that office?

A. I am, sir.

Q. And particularly those pertaining to the years 1941, 1942, 1943 and 1944, of J. Baker Bryan or J. B. Bryan, as they are made out here?

A. Yes, sir.

Q. I hand you a paper marked, "United States Individual Income Tax Return, 1941, and ask you what that paper is.

A. It is an individual income tax return for the calendar year 1941, filed by J. B. Bryan, 7830 Laura Street, Jacksonville, Florida, reflecting tax in the amount of \$104.95.

Mr. Yerkes: I offer this in evidence as "Government's Exhibit No. 1".

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

Q. Mr. Gravelly, I now hand you paper marked, "United States Individual Income Tax Return, 1942" of J. B. Bryan, and ask you what that paper is.

A. This paper is the individual income tax return for the calendar year 1942, filed by J. B. Bryan, 7830 Laura Street, Jacksonville, and shows tax—

[fol. 39] Mr. Muskoff: The paper speaks for itself. He is going way beyond the question there.

Mr. Yerkes: I offer this in evidence as Government's Exhibit No. 2.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence as Government's Exhibit No. 2.

Mr. Muskoff: I notice the witness apparently has some memorandum on the witness stand that has not been handed to him.

The Court: Do you have your own notes to refresh your memory?

The Witness: That is correct.

The Court: You may use them.

Q. I now hand you paper marked, "United States Individual Income and Victory Tax Return, 1943", which said return is marked, "Received April 16, 1945, Collector of Internal Revenue, Jacksonville, Florida", and ask you what that paper is.

[fol. 40] A. This paper is Individual Income and Victory Tax Return for J. Baker Bryan, Sr., 7830 Laura Street, Jacksonville, for the calendar year, 1942.

Q. This was received in your office in 1945?

A. It was received by the Collector of Internal Revenue under date of April 16, 1945.

By the Court:

Q. And what year is it for?

A. 1943.

Mr. Yerkes: I offer this in evidence.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 3.)

Q. I now hand you paper marked, "U. S. Individual Income Tax Return for Calendar Year 1944", and ask you what that paper is.

A. Individual income tax return for the calendar year 1944 filed for J. Baker Bryan and wife Evelyn, 7830 Laura Street, Jacksonville, Florida, received in the Office of Collector of Internal Revenue May 4, 1945.

Mr. Yerkes: We offer the paper just testified about in evidence. May it please the Court, we have photostatic certified copies which I would like to leave with the Clerk.

[fol. 41] The Court: You may file them with the Clerk for

identification and substitute them for the originals when you get through with the case.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 4".)

The Court: The United States Attorney has filed with the Clerk photostatic copies of these income tax return exhibits, numbered 1, 2, 3 and 4, which have just been offered and received in evidence, and I order that at the conclusion of the case the photostatic copies may be substituted for the originals and the originals withdrawn from the file. In case either of you should have any use for the originals, I will withhold the substitutions until the time when you are ready for the substitutions to be made; but I will require the substitutions to be made in due course.

(Whereupon, Exhibits 1, 2, 3 and 4 are shown to the Jury.)

Q. Have you what is know as, "~~Certificate of Assessments and Payments~~"?

A. Yes.

Q. I will ask you, then, what is that paper you have in your hand?

[fol. 42] A. "Certificate of Assessments and Payments," Form 899, Treasury Department form.

Q. Who does that apply to?

A. It applies to J. Baker Bryan.

Mr. Yerkes: We now offer in evidence the "Certificate of Assessments and Payments for the years 1941, 1942, 1943 and 1944, that was just testified about.

Mr. Muskoff: We object; it is tending to prove no issue in the case. It is merely a paper made up by the Government. It is not an official record of any kind, or copies of records; and doesn't tend to prove any of the issues in the case.

Mr. Yerkes: This is a certificate of assessment; it is an official document which has been prepared by the Collector's office. I think it has probative value and the witness has testified, and I will go into it a little further.

Q. What is this Certificate of Assessments that you have just handed me, particularly the first page, which



applies to the years 1941, 1942, 1943 and 1944; explain to the Court what that it, so he will understand.

A. That certificate is made up merely to show the things as reflected by the books and records in my office. It shows whether or not a return was filed, if so, the amount of tax shown to be due, whether or not it was paid, and any outstanding balance.

[fol. 43] By Mr. Muskoff:

Q. You made that up especially for this trial; did you not?

A. Yes, sir.

Mr. Muskoff: I object to it.

The Court: It may be filed for identification.

Mr. Yerkes: When its materiality is shown, we can re-offer it?

The Court: Yes. You may mark it for identification.

(Same is marked, "Government's Exhibit No. 5" for identification.)

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions, whatsoever.

(Whereupon, a recess was had at 12:30 P. M. until 2 P. M., the Court first admonishing the jurors not to discuss the case among themselves, or with anyone else during the lunch recess, and to keep an open mind in the matter until the entire case has been submitted and they have heard the arguments of counsel and the charge of the Court.)

[fol. 44] (Whereupon, at 2 o'clock P. M., Court reconvened and the following proceedings were had:)

GRACE W. RAWLEY was called as a witness on behalf of the United States and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Will you please state your name?

A. Grace W. Rawley.

Q. Where do you live?

A. 1774 Mayfair Road.

Q. What is your occupation?

A. I am a nurse and a bookkeeper.

Q. Are you a registered nurse?

A. I am.

Q. You say you are a bookkeeper?

A. Yes; those are part of my duties in my present employ.

Q. You just keep books?

A. And nurse.

Q. Do you know this defendant sitting over here; J. Baker Bryan, Sr.?

A. I do.

Q. How long have you known him?

A. I have known him off and on, I guess, for ten years.

Q. Did you ever have any position with him?

A. I have done work for him.

[fol. 45] Q. What kind of work?

A. Keeping records.

Q. During what time did you keep records for him?

A. Since 1943.

Q. Did you prepare any income tax returns for him?

A. I have.

Q. I hand you Government's Exhibit No. 3, which is the income tax return of J. Baker Bryan for the year 1943, and ask you if you are familiar with that document.

A. I am.

Q. Did you prepare it?

A. Yes, sir.

Q. I hand you Government's Exhibit No. 4, which is, "U. S. Income Tax Return for the Calendar year 1944", made by J. Baker Bryan and wife Evelyn, and ask you if you prepared that income tax return?

A. I did. Am I allowed to examine those to see if they are as I filed them?

Q. Yes, you sure can. (Witness is handed said exhibits which she examines.) I ask you whether or not on or about March 6, 1946, Mr. Reading and this gentleman sitting here, Mr. Marquis, took a sworn statement from you with reference to what you know about this case.

A. Yes, sir.

Mr. Muskoff: I object to that, whether or not they took a sworn statement, and move to strike the answer. I object to the question on the ground it is immaterial.

The Court: I will deny the motion and overrule the objection to the answer. You have the witness here, however, [fol. 46] and due to her presence you will have to examine her. She can use the statement as a reference.

Mr. Muskoff: If she prepared it, not if the Government prepared it.

The Court: She can use it as a reference with respect to questions.

Q. Is that your signature? (Indicating.)

Mr. Muskoff: I object to the examination of the paper at this time by the witness, which purports to be a statement by a Government witness made to another Government man.

The Court: The objection is overruled. I rule, however, that the statement, itself, is not admissible, except by agreement of counsel.

Q. Is that your signature? (Indicating.)

A. Yes, sir.

Q. You made that statement as contained there?

A. That is my signature.

Q. Did you make that statement—?

Mr. Muskoff: Object to that; she can testify to what the facts are.

The Court: Objection sustained. We won't go any further with this statement unless something develops that makes it become important.

[fol. 47] Q. You have stated that you are a trained nurse and keep books; is that right?

A. I am at present.

Q. At present?

A. Yes, sir.

Q. You stated that you have known J. Baker Bryan, Sr. for something like ten years?

A. That's right.

Q. When did you first accept employment from him?

A. I prepared records for him in 1943.

Q. And in 1943 and 1944 you prepared his income tax returns?

A. That's right.

Q. Were you assisted by anyone in making out those returns; those two that you have examined?

A. No.

Q. Where did you get the information to make out those returns?

A. I got that from the daily sales records, from the cash receipts, register receipts, and from the information furnished me by the taxpayers, Mr. and Mrs. Bryan.

Q. You just entered such records as they gave you; or he gave you?

A. Some from the records I know of, businesses, from the records that were available to me.

Q. Who made the records available to you?

A. Well, I collected the records, the daily sales and receipts, from various businesses that he had.

Q. Did you keep any records for anything except the Skyway and Showboat?

A. The Windmill. I don't know whether he owned the Windmill at that time.

[fol. 48] Q. I ask you, in that statement you were asked: "Were you furnished—?"

Mr. Muskoff: Object; he can't disqualify his own witness.

The Court: We are not there yet, Mr. Yerkes. You go ahead and examine this witness, then if she becomes a surprise witness on your part, you may examine a little further.

Q. Do you know anything relative to the records or books of account maintained by J. Baker Bryan, Sr. during the years 1943 and 1944?

A. How do you mean that question?

Q. I want to know what records you were familiar with, how you got them, and all about them.

A. May I have the income tax return and I can recall it better and tell you what I was familiar with.

Q. Would you like to refresh your recollection from this statement?

A. I don't know whether that would help me, or not.

Q. Well, here it is if you want it.

A. I can tell better by the returns. (Examines returns.) I compiled the records on the Skyway and Showboat Clubs and I picked up the cash receipts and disbursements usually twice a week.

Q. For those two?



A. Yes, that's right. And from the rental properties I usually checked with Mrs. Bryan; she usually kept the records on those.

Q. The records you got on property were what they gave you and not from their original sources; is that right?

A. That's right.

[fol. 49] Q. Now, getting back to the Skyway, where did you get information on those records?

A. From the receipts and disbursements.

Q. Who gave you those receipts?

A. I collected them each week.

Q. From whom?

A. From the manager, or whoever happened to be in charge at the time.

Q. Did you go out to the Skyway and get them?

A. That's right.

Q. A couple of times a week?

A. That's right.

Q. What was the nature of the records?

A. Cash receipts and disbursements, register receipts and disbursements and the bills and pay-outs.

Q. Is that all the records they gave you, from the Skyway?

A. Not for the year 1943.

Q. What do you mean by that?

A. I have a record here of "Beat My Shake".

Q. Where was, "Beat My Shake"?

A. That was a club room, I believe.

Q. Where?

A. At the Skyway.

Q. That would be the Skyway again?

A. Yes.

Q. So you know nothing about the other investments he had, except such information as Mr. or Mrs. Bryan gave you?

A. That's right. Other than these records, some of these rents; in fact, practically the rest of them are rents.

[fol. 50] Q. On the rents, that information was given you by whom?

A. Usually by Mr. or Mrs. Bryan; from the records they kept.

Q. Do you know whether or not they had rental agents?

A. They had rental agents for some of the property.

Q. You didn't go to those rental agents to find out——?

A. I had contacted some of the rental agents.

Q. Who were they?

A. Mr. Robert Moon is one. The other income, I think, was paid directly to them.

Q. What other income?

A. From rents.

Q. Then such information as you got from Mr. or Mrs. Bryan and possibly one rental agent, that was all the information that you had to get up these returns; is that right?

A. That's right.

By the Court:

Q. You have testified that you took such information as was available and all the additional you got from either the defendant here, or his wife?

A. That's right.

Q. At that time, was Mr. Bryan the only person you kept books for?

A. I don't remember. I will have to check back on that.

Q. Now, how often did you say these daily receipts, bills and invoices were delivered to you?

A. I picked them up twice a week, usually.

[fol. 51] Q. Where did you pick them up?

A. From the business.

Q. In other words, you went out to the Skyway?

A. Yes.

Q. How about the bills paid out?

A. The same way.

Q. You went out and got those?

A. That's right.

Q. But you only did that for the Showboat and Skyway; is that right?

A. I don't guess the Windmill was in operation yet. That was all for those two years.

Q. Were you furnished copies of the bank deposit slips for posting Mr. Bryan's books?

A. Yes. Of the deposit slips?

Q. Yes.

A. No, sir.

Q. Did you post a record of the checks issued from the checkbooks or from the canceled checks?

A. From the checkbook stubs.

Q. You didn't check any other checks that were given?

A. I checked after. I would check the canceled checks against my records, but originally they were taken from the stubs.

Q. Do you have any knowledge of Mr. Bryan's activities other than the Skyway Club and the Showboat, and those rents you have talked about?

A. Other than what he has given me?

Q. In other words, except what he has——?

A. There is a record of everything he has given me.

Q. Everything he reported to you?

A. That's right.

[fol. 52] Q. You had no way of knowing at that time whether he was reporting everything to you, or not; had you?

Mr. Muskoff: I object to that. That is certainly a prejudicial statement on the part of counsel.

The Court: I sustain the objection. It may be self-serving. That would call for an opinion of the witness and an opportunity to make a self-serving declaration on either side of the case.

Q. At that time, the years 1943 and 1944, where did Mr. Bryan have his bank account, or Mrs. Bryan?

A. Mrs. Bryan had her account at the Florida National Bank.

Q. Did Mr. Bryan have any bank account in Jacksonville?

A. I would have to consult the records; I don't remember.

Q. But the account in the Florida National Bank was kept in whose name?

A. Mrs. Bryan.

Q. Was there any other account in her name?

A. I don't know.

Q. Was there an account in the Atlantic National Bank?

A. For Mrs. Bryan?

Q. Yes. Wasn't there a special account over there?

A. Not for Mrs. Bryan. Mr. Bryan had an account for sometime, but I think it was after the Windmill opened. That was not in these two years.

[fol. 53] Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. There was no mystery as to how those records were kept out there; was there?

A. No, sir.

Q. You say that you took the gross receipts; how did you arrive at those gross receipts; who did you go to see?

A. Usually Mrs. Bryan; and I checked each time I went out.

Q. Did you check with Mr. Bryan, or whom?

A. When Mr. Bryan was there he usually helped us with it.

Q. What did they give you to show what the gross receipts were?

A. The register receipts?

Q. That is the spool that coils upon the register?

A. Yes, the daily register stubs.

Q. What did they do with the bills for money they spent?

A. They saved them for me and I made a record of them.

Q. Who saved those for you?

A. Mrs. Bryan was usually responsible for it.

Q. Mrs. Bryan was?

A. Yes, sir.

Q. How about the help around there; did they place the bills where you could get them?

A. The help usually turned it over to Mrs. Bryan. I didn't have contact with the employees. Mrs. Bryan and [fol. 54] I would meet there at a certain time and the employees, or whoever paid the bills when she was not around, would turn them over to her.

Q. Mr. Bryan didn't pay those bills; Mrs. Bryan paid those bills?

A. I think Mr. Bryan paid them when he was there.

Q. Was he there all the time?

A. Not all the time.

Q. Now, they referred to "Beat My Shake"; do you know what that is?

A. No, I don't; it is some gaming device.

Q. Something you don't know anything about?



A. No, sir.

Q. How did you check that; how did you get that?

A. The amount was furnished to Mr. Bryan by someone in connection with that part of it.

Q. With the gaming part of it?

A. That's right; and he furnished that to me.

Q. Do you know whether or not Mr. Bryan actually ran that, or somebody had that concession?

A. I don't think he ran it; it was a concession.

Q. And the man running the concession—

Mr. Yerkes: Object to that.

By the Court:

Q. Let's make sure whether or not she knows whether it was under the operation of the defendant. Do you know that of your own knowledge? Make a direct statement. Do you know as a matter of fact whether this defendant operated it or had the concession out to somebody else?

[fol. 55] A. I don't know.

Q. All you know is what you heard?

A. I am pretty sure it was a concession, but as to making a flat statement—

Q. I just want to know if you had records before you to enable you to determine whether or not it was a concession or whether or not it was operated by the defendant.

A. No, sir.

By Mr. Muskoff:

Q. Some place you could figure what was paid in and how much was paid out on that game?

A. The concession was just the amount of Mr. Bryan's share of it.

Q. You are positive it was just Mr. Bryan's share?

A. That's right.

Q. Just his share?

A. Yes.

Q. Now, when you got to the other place, like the Showboat—or, I think you mentioned the Showboat—who would you get the records from there?

A. At the Showboat? May I ask a question?

By the Court:

Q. Can you answer it? Do you need more information to answer the question? You can ask me.

A. What I want to know is, the Showboat was under the management of an individual and he furnished me with a breakdown of the records. I didn't have access to the actual records at that particular time. I have kept [fol. 56] records on the Showboat, but don't know whether it was those particular years.

By Mr. Muskoff:

Q. What I want to bring out, did Mr. Bryan furnish those, or did somebody in charge of the Showboat?

A. The manager at that time, if this was the year; I don't know.

Q. The manager usually gave those to you?

A. That's right.

Q. Who set up the books; the general over-all books out there; did you or Mrs. Bryan set them up?

The Court: Let's first find out if they had any books. I understand they didn't have.

Q. From the information you received, did you set up a system of bookkeeping?

A. When I was doing the records of the Skyway I did, and the records on the Showboat.

By Mr. Yerkes:

Q. You set up records on each of those two clubs?

A. Yes, at the time I was taking care of them.

By the Court:

Q. What I want to know is, those were merely records you kept of the information you got?

A. Yes, sir.

[fol. 57] By the Court:

Q. I want to make sure whether or not they maintained a set of records for those clubs; whether the defendant maintained a set of records for those clubs and permitted you to examine them.

A. I maintained the records.

Q. You testified you set up records from the information they furnished you.

A. From cash receipts and disbursements.

By Mr. Muskoff:

Q. Like all places of business, you took what was furnished you——?

Mr. Yerkes: I object to counsel injecting those things into the record.

The Court: Mr. Muskoff, the preliminary wording of your question is entirely inappropriate; reframe it.

Q. In the normal course of business, the normal information——?

Mr. Yerkes: Object; it is immaterial and irrelevant.

The Court: Let him finish the question.

Q. In the normal course of business did they furnish you the usual information pertaining to that business, that bookkeepers usually find?

[fol. 58] The Court: I direct her not to answer that question.

By Mr. Muskoff: How long have you been keeping books for anyone?

A. I think I started in 1943, keeping records. I didn't really set up any kind of a bookkeeping system.

Q. Did you ever work for anybody other than Mr. Bryan, as a bookkeeper?

A. I had kept records.

Q. For whom did you keep these records prior to that time?

A. Prior to what?

Q. The time you went to work for Mr. Bryan?

A. Oh, no; I don't believe I kept any for anyone.

Q. You don't believe you did?

A. No, sir.

Q. You got most of your information, you said, from Mrs. Bryan?

A. Yes, Mrs. Bryan and I. Mr. Bryan, of course, when he was out at the business; he had to oversee things; and Mrs. Bryan and I usually checked the records; usually about twice a week.

Mr. Muskoff: That is all.

# Redirect examination.

By Mr. Yerkes:

Q. Now, you stated out at the Skyway that you kept the record of sales from the tape; is that right?

A. That's right.

[fol. 59] Q. What else did you keep?

A. The disbursements.

Q. How did you get the disbursements?

The Court: That is just repetition.

Q. You stated about some gaming, what was that, up in the gambling room?

A. Yes.

Q. How did you get that information?

A. It was furnished to Mr. Bryan and Mr. Bryan furnished it to me.

Q. All you know of your own knowledge is that he furnished it to you?

A. Yes, that's right.

Q. When you say it was furnished to him—

The Court: She testified that all she knows is what he told her and that is all you can find out from her.

Mr. Muskoff: I think she made the statement that he furnished her records, or someone did.

By the Court:

Q. Were you furnished records, or merely information, by the defendant?

A. I have no records to refer to. Several years ago when the Internal Revenue wanted their records I carried [fol. 60] to Mr. Bryan all my copies and work sheets and inadvertently they left them have all my work sheets and all my records that I had. I have not received those back and I have nothing to refer to as to where my information came from or how.

Q. Did he keep any account of the revenue he derived in any book account, of the revenue that you referred to as the gambling room?

A. No, that was a concession.



Q. The question, is whether or not that information was orally given you or whether or not it was given you otherwise?

A. I am not sure, but I believe I got a written report on that information.

Q. You are not certain, but your impression is that you got a written report?

A. That's right.

Q. And who made that report?

A. I don't know. It was given me by Mr. Bryan, but who furnished it to him, I do not know.

By Mr. Yerkes:

Q. You stated you kept records; what is the difference between keeping books and records?

A. I would say a bookkeeper would take charge of everything and have access to everything. I had not the time to do that; consequently, I did merely what I could to keep the records and Mr. Bryan depended on someone else to keep those records?

Q. Mr. Bryan had another set of records?

A. No, I did not say that.

[fol. 61] Mr. Muskoff: Object to that; it is not what she said.

The Court: You can ask her whether or not to her knowledge this defendant kept a set of books that he did not make available to her.

Witness: No, I don't think he did.

The Court: So far as you know, he didn't?

Witness: No, sir.

Q. How were your gross receipts checked? You talked about gross receipts he gave you out at the Skyway; how did you check them?

A. From the register receipts.

Q. That is all you had?

The Court: Why do we need to keep on going over that ground? I am sure the Jury and I understand it.

Mr. Yerkes: That's all.

[fol. 62] Recross-examination.

By Mr. Muskoff:

Q. As I get it, these register receipts, were there more than one set of them out there; was there more than one register?

A. Yes; and I think there was a register for the front and a register for the back.

Q. The show room?

A. Yes.

Q. And you picked up those register receipts?

A. That's right; they were bound up by the day, receipts and disbursements. They were all put together in one package day by day.

Q. How were most of the bills paid out there?

A. By cash. I believe the liquor bills were paid by check.

Q. The register would register all paid out and receipts on a register tape?

A. That's right.

Q. And you took those to get your figures?

A. That's right.

Mr. Muskoff: That's all.

Re-redirect examination.

By Mr. Yerkes:

Q. Did you have any way of telling on the "Paid Out" what it was paid for?

A. Yes.

[fol. 63] Q. How would you tell that?

A. The bill was with it.

Q. Were there always bills to accompany those "Paid Outs"?

A. Yes. If there was no bill, if it was something like a petty item, they would have them write out a little slip of paper for it.

Mr. Yerkes: That's all.

(Whereupon, the witness was excused.)

The Court: Let the record show that due to illness in the family of G. W. Louck, a juror in the trial of this case, he

has been withdrawn and excused, and that the case, by agreement of counsel for the Government and counsel for the Defendant, will proceed to trial with eleven jurors.

C. M. STOKES, JR., was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Stokes, please state your name.

A. C. M. Stokes, Jr.; Charles M. Stokes.

Q. Where do you live?

A. Mandarin, Florida.

Q. Do you know this defendant over here, J. Baker Bryan?

[fol. 64] A. Yes, sir.

Q. Did you ever have an agreement or partnership with him with reference to the Showboat?

A. Yes, sir.

Q. I will ask you whether or not on or about July 26, 1943, whether you sold him your interest in the Showboat?

A. Yes; I don't remember the exact date.

By the Court:

Q. Have you a memorandum there that will enable you to give it to us?

(Witness looks at memorandum.)

A. What date did you say?

Q. July 26, 1943.

A. My notes say, from Showboat books, 9/2/43. I might have sold it out a few days ahead of this and then went over and got these figures off the book later.

Q. How much did you sell your interest in the Showboat to Baker Bryan for?

A. \$2,000.00.

Q. In other words, was that the original agreement?

A. No; the original agreement was \$2,500; but he gave me a note for that and a few days later offered me \$2,000, which I accepted.

By the Court:

Q. You mean he offered you cash, \$2,000, for the \$2500. note?

A. Yes; because it was taking a loss and I took another loss along with it.

[fol. 65] By Mr. Yerkes:

Q. Was that \$2,000 in cash or check?

A. Cash. His bookkeeper gave it to me.

Q. Who was that?

A. Doc. Elliott.

A. Where was his place of business?

A. At the Showboat.

Q. He was the bookkeeper there?

A. He was the manager and bookkeeper. I think Mr. Bryan laid the money out first and Doc. Elliott came in and checked it over and counted it out to me.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Cockrell:

Q. Mr. Stokes, the Government asked you about the Showboat and your having been in it; what sort of an arrangement was that?

A. You mean my partnership?

Q. Yes.

A. It was a verbal arrangement to start with; we were to draw up the papers later, but never did.

Q. Why not?

A. We never got that far. We just got it open and commenced losing so much money I got out of it.

Q. So the Showboat was a losing venture and you got out as quick as you could. How much did you lose?

A. \$3,160.04.

Q. You and Mr. Bryan were equal partners?

A. No; he had more money than I had. I have a list of what I furnished, and then we were to get our figures [fol. 66] together and I was to pay him, or he pay me; but he had more money in it than I did.

Q. So his loss was bigger than yours?

A. Much bigger.



Q. Did you and Mr. Bryan buy the Showboat together?

A. No, he bought it first and either called me up or sent me word and I went out to see him and he wanted me to go in partners and I asked him how much money it would take and he said, "Not much", but it took a lot; it was in bad shape.

Q. The Showboat was bought while it was in bad shape and you fixed it up together?

A. Yes. The gangplank alone cost \$800. It was in very bad shape and it was my job to get it open through the Coast Guard. They have to O. K. it before it could open on the water. They told me we had to build this gangplank and get life preservers for every person on board; had to re-wire it and do a lot of carpenter work on it.

Q. So you and Mr. Bryan both took a big loss?

A. By the time I got out of it I had \$400 a week loss.

Q. And he had a bigger loss, you say, than you did?

A. I think he did.

By the Court:

Q. Did you ever get it in operation?

A. Yes, we had it in operation, but we couldn't open. You see, it was a night club and we couldn't open until probably 9 or 10 o'clock and the S. P.'s and the M. P.'s closed us at 12:00. I remember one week the pay-out for labor was more than the income.

[fol. 67] Q. How long did you have it open before you sold out?

A. I don't remember; three or four weeks.

Q. And it had been closed prior to that time?

A. The American Legion had run it up until the time we taken it over then we remodeled it. Remodeling it, I spent over \$5,000, but it cost over \$20,000.

By Mr. Cockrell:

Q. Was there ever any gambling on the Showboat?

A. No.

Q. What sort of business was it?

A. Night club, dance hall, with floor show; and we sold whiskey and food; a general night club; just food and drinks.

Q. Food and drinks?

A. Yes, and we charged admission too, but with all of that we could not make it pay.

(Whereupon, the witness was excused.)

GEORGE W. HESS was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. George W. Hess.

A. Where do you live?

A. Clay County, beyond Green Cove.

Q. Do you know this defendant, J. Baker Bryan, sitting here?

[fol. 68] A. No, I do not. This is the first time I have ever seen him.

Q. Did you ever sell J. Baker Bryan property known as 1315 Newnan Street?

A. Yes, sir.

Mr. Muskoff: I don't see how a man can say he sold somebody that he doesn't know at all, if your Honor please.

The Court: We will find out.

Q. Did you sell that direct, yourself, or through an agent?

A. Through an agent.

Q. Who was that agent?

A. John Harrell.

Q. Was that property known as Lot 3, Block 2, of Jacksonville?

A. Yes, sir.

Q. And is located where?

A. 1315 Newnan Street.

Q. And what other street, close to Bay Street?

A. Between Bay and Forsyth.

Q. What was the price you sold that to Mr. Baker for?

A. \$7500.00.

Q. Did you receive the money?

A. Yes, sir.

Q. To whom did you execute a deed?

A. The heirs all signed the deed; there were five of them.

[fol. 69] Q. And the matter was handled by Mr. Harrell?

A. That's right.

By the Court:

Q. Who was the grantee, that is Mr. Yerkes' question; who bought it?

A. It was bought for J. Baker Bryan.

Q. When you say "bought for", what do you mean by that?

A. The deeds were made out to him.

Q. The deeds were made out to J. Baker Bryan, or Baker Bryan?

A. That's right.

Mr. Muskoff: I object; the instrument, itself, will certainly be the best evidence.

The Court: If you need it, we will get it. That's true; your objection is good; but the testimony, in absence of a motion to strike, we will let it go.

By Mr. Yerkes:

Q. Did you get paid by check or cash?

A. I got it by check and went downstairs to the bank and got the money and put it in the bank the same day.

Q. But you received a check from Mr. Harrell?

A. That's right.

By the Court:

Q. It was Mr. Harrell's check?

A. I don't remember.

[fol. 70] Q. You can't tell this jury that it was the defendant's check?

A. I would not swear to that. I believe it was, but won't swear to it. I know I got the money; it was a good check.

Mr. Yerkes: Your witness.

Mr. Muskoff: No cross-examination.

(Whereupon, the witness was excused.)

WILLIS D. RUMBAUGH was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Willis D. Rumbaugh.

Q. Where do you live?

A. 6817 Riviera Drive, Coral Gables, Florida.

Q. What is your business?

A. Retired.

Q. What was your business or occupation during 1943 and 1944?

A. Laundry and Dry Cleaning.

Q. Did you ever own a piece of property designated as 2825 S. Miami Avenue, Miami, Florida?

[fol. 71] A. Yes, Sir.

Q. To whom did you sell that property?

A. I sold it, I think it was, to J. B. Bryan; Mr. Bryan and his wife.

Q. Who handled that transaction for you?

A. Through his attorney, Mr. Muskoff, and National Title.

Q. The National Title Company of Miami?

A. Yes, and Mr. Muskoff.

Q. What was the purchase price, or sales price?

A. \$30,000.00.

By the Court:

Q. What was the year and the month?

A. I think it was December, 1944.

Q. How was that transaction handled; or, what was paid down?

A. This check I had was for \$4,000. It was made, I think, directly to me. At that time, Mr. Muskoff was going to handle the deal himself, but upon closing of the statement and examining of the abstract I told him of my deals, I always closed through the National Title and it already had National Title insurance on it and I thought it was to his advantage to close the deal through the National Title; which we did.



By the Court:

Q. How was the balance paid?

A. The balance at that time, he was paying me \$7500 as a downpayment on the property and the rest was covered by a mortgage.

Q. Of the \$30,000 you got \$7500 of it?  
[fol. 72] A. That is correct.

Q. It had a \$22,500 mortgage on it?

A. Yes, Sir.

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

A. W. Hoover was called as a witness on behalf of the United States and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Will you please state your name?

A. A. W. Hoover.

Q. Where do you live?

A. Miami, Florida.

Q. What is your business?

A. Title insurance.

Q. Did you ever close on a piece of property from Mr. W. D. Rumbaugh?

A. The company did.

Q. Did you handle it?

A. I didn't; Mr. Phillips did.

Q. I hand you a paper and ask you what that is?

A. This is the closing statement on a transaction between W. D. Rumbaugh and wife, as sellers, and J. B. [fol. 73] Bryan and Evelyn Bryan, as purchasers, of part of Lots 14, 15, 16 and 17 of Block 57, Flagler Subdivision—.

Mr. Muskoff: I object to the witness testifying. He didn't handle it.

By the Court:

Q. Are you the custodian of the record?

Mr. Muskoff: I don't think it is a record of the National Title Co.; it is not part of their records; that is a record that was made for him.

A. I have a copy of it.

Mr. Muskoff: I have no objection to its going in.

The Court: Let's save the jury's time. Put it in evidence.

(Same is marked, "Government's Exhibit No. 6".)

Mr. Yerkes: That is all I have, except to exhibit this to the Jury.

The Court: Does this have to do with the transaction the other man testified about, or a different one?

Mr. Yerkes: The same one.

[fol. 74] The Court: What is the information on there that is of any particular consequence to the Jury?

Just the same as the other one; just a few dollars difference. That also shows the amount of the outstanding mortgage when they got through.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

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J. T. G. CRAWFORD was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Crawford, please state your name.

A. J. T. G. Crawford.

Q. You are an attorney?

A. That's right.

Q. I would like to ask you in reference to a certain closing that took place in your office in reference to the Windmill Restaurant. Do you have records on that closing?

A. Yes, I have my complete file on it.

Q. I will ask you whether or not in that transaction Mr. Bryan was purchasing from a man by the name of

"Shields" the property known as the Windmill Restaurant?

[fol. 75] A. That's right.

Q. What date was that, if your records show?

A. I took the ledger sheet from my book and it shows the purchase money was received on August 11, 1944.

Q. What was the amount of the purchase money?

A. The only amount I have any knowledge of was the sum of \$13,500. There was a preliminary contract. We did not represent the seller of this property; we represented the executors of the will of John H. Swisher, who held a mortgage on it.

Q. In that closing, wherein James M. Shields transferred to J. Baker Bryan, you represented the Swisher Estate to clear a mortgage of \$13,500?

A. No, it was not that much mortgage on it. Mr. Shields had a considerable equity in it. The final disbursement through my office was \$7,876.38 to the Swisher executors, \$2,219.38 to Mr. Shields, and the same amount, plus one cent, to Mrs. Shields.

Q. In other words, Mr. Baker Bryan paid you for that account on the account of those three people, \$13,500?

A. I have no independent recollection of Baker Bryan paying any money. There was a check went through my office, but I don't remember ever seeing the check or whose check it was. The bookkeeper shows this much money received from Mr. Bryan. I know that the deed was made by Mr. Shields to Mr. and Mrs. Bryan.

Q. According to your record it was their names on the deed?

A. The carbon copy of the deed.

By the Court:

Q. Who were the grantees?

[fol. 76] Mr. Muskoff: Again we are running into this same thing, secondary evidence that can be correctly proved by primary evidence. We are going to run into that thing time and time again.

The Court: In a case like this I could have had a pre-trial conference and stopped that.

Mr. Yerkes: This is the best evidence we have; we haven't possession of that deed.

Mr. Muskoff: The attorney does not know the law; he knows the best evidence is a certified copy of the record.

By the Court:

Q. Who does that copy show was the grantee?

A. The deed was made on a printed form. This is a skeleton, but shows the grantors to be James M. Shields and wife Jennie; and the grantees were J. Baker Bryan and his wife, Evelyn Bryan.

Mr. Yerkes: Your witness.

[fol. 77] Cross-examination.

By Mr. Muskoff:

Q. Mr. Crawford, all that was paid by check; wasn't it?

A. Mr. Muskoff, that was four years ago. I have no recollection of ever seeing the check. I know it was never paid in cash. I don't know whose check it was; I could not say from an independent recollection whose check it was. Like all of the other witnesses stated, it was a good check.

Mr. Muskoff: That's all.

Redirect examination.

By Mr. Yerkes:

Q. Mr. Crawford, do you know a lady by the name of Ethel L. Coulter?

A. No, not right out of a clear sky. In what connection?

Q. This involves Lots 9 to 16 inclusive, in Oakwood Villas in S. Jacksonville.

A. If that went through my office, Mr. May must have handled it.

By the Court:

Q. You are not ready to testify with reference to that?

A. No, Sir.

[fol. 78] Mr. Yerkes: That's all.

(Whereupon, the witness was excused.)



WILBUR W. SASSER was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Sasser.

Q. What is the first name?

A. Wilbur W.

Q. Where do you live?

A. In the Miami area; Coral Gables, Greater Miami.

Q. What is your business?

A. Vice-President of the Florida National Bank & Trust Co., at Miami.

Q. Did you bring certain bank records with you, as requested?

A. Yes, Sir. (Witness produces records.)

Q. And in particular, did you bring the records to show the deposits and withdrawals of J. B. Bryan, or J. Baker Bryan?

A. I have one deposit.

Q. What was that?

A. A deposit of \$40,000.00.

Q. When was that deposit?

A. October 16, 1944.

[fol. 79] Q. What do the withdrawals show?

A. There was only one check against the account and this check was written on the 16th of October.

By the Court:

Q. Of the same year?

A. Of October, 1944, yes; payable to Dade Commonwealth Title Co., in the amount of \$38,938.72. This check is signed, "J. B. Bryan".

Q. You have two records there, just state to the Court what they are.

A. The deposit book showing the deposit that was made to the account and the check against this account, which I just described.

Mr. Yerkes: We offer these in evidence.

Mr. Muskoff: No objection.

The Court: Let them be received in evidence.

(Same are marked, "Government's Exhibit No. 7".)

Q. What was the form of that deposit?

A. The deposit book shows, according to the symbol, that it was a check described as "5". "5" to us is the Florida National Bank in Jacksonville. That is the A. V. A. Code number here, which is "5"; that the deposit was represented by a check, better known as a "Cashier's [fol. 80] check", on the Florida National Bank at Jacksonville, payable to Baker Bryan, in the amount of \$40,000.00.

Q. What is that record you have in your hand?

A. The copy of the check.

Q. A photostatic copy of the check?

A. Yes, Sir.

Mr. Yerkes: We offer this in evidence.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 8".)

Q. What was the balance in that account on the 31st of December, 1944?

A. I don't have that record.

Q. Did you bring a ledger sheet with you?

A. Yes, Sir.

Q. What does that show?

A. The only entries on this ledger sheet is the deposit and the check.

By the Court:

Q. The deposit and the one check.

A. Yes, Sir.

Q. Had any check been drawn and cashed during the year 1944, would it show on that letter sheet?

A. The records that I have don't show.

[fol. 81] Q. If any had been, would it show?

A. If it had been in the month of October, it would.

Q. That is just the ledger sheet for the month of October?

A. Yes, Sir.

Q. You haven't the ledger sheet for the year?

A. No.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. All this was handled by check; wasn't it?

A. The deposit was a check and the withdrawals, of course, was a check.

Mr. Muskoff: That's all.

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(Whereupon, the witness was excused.)

HAROLD INGLE was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Ingle, will you state your name?

A. Harold Ingle.

Q. Where do you live?

[fol. 82] A. Coral Gables, Florida.

Q. What is your business?

A. Vice-president of the Dade Commonwealth Title & Insurance Company.

Q. Were you so employed during 1944?

A. No, Sir.

Q. When were you first employed by them?

A. January of 1945.

Q. Did you bring certain records with you in reference to sale of certain property to J. B. and Mary Evelyn Bryan, know as Lots 3, 4, 5, 28, 29 and 30 of Block 6, Miami Subdivision Acres?

A. That is Miami Suburban Acres, I believe, and I brought the records.

Q. Let me see those records? (Witness produces records.)

Q. You stated you were with the Dade Commonwealth Title Co.?

A. That's right.

Q. I hand you a paper which you have just given me and ask you what that is.

A. That is a copy of the closing statement wherein J. B. Bryan and wife Evelyn purchased Lots 3, 4, 5, 28, 29 and 30, Block 6, Miami Suburban Acres.

Q. In handling transactions on those closing sheets, what did they show and set forth?

A. They set forth the purchase price and the manner in which the purchase is made, and also the details involved in closing the transaction. It also includes certain credits for proration of taxes and that sort of thing.

[fol. 83] Q. And this that you have handed me is one of those closing statements on Lots 3, 4, 5, 28, 29 and 30, Block 6, Miami Suburban Acres?

A. It is.

Q. And this is a part of the records of your company?

A. Yes, Sir.

Mr. Yerkes: We offer this in evidence.

Mr. Muskoff: I would like to ask the witness some questions.

The Court: All right.

Cross-examination.

By Mr. Muskoff:

Q. Did you have anything to do with this transaction, whatsoever?

A. No, I did not.

Q. Who handled it?

A. I understand —

Q. Do you know who handled it?

By the Court:

Q. You were not there when the transaction was handled?

A. That's right.

Q. Was this record produced under subpoena duces tecum?

A. Yes, Sir.

[fol. 84] Q. Is this record in your possession?

A. Yes, Sir.

Q. And went into your possession in January, 1945.

A. It is a record of the Company and I had access to it.

Q. And you brought it up here in response to a subpoena duces tecum?



A. Yes, Sir.

Q. Is this record a part of the books and papers of the Company, or merely a file entitled in somebody's name that this information is kept in?

A. It is a file written by the Company.

Q. Who made the expenditures that you talked about?

A. The expenditures referred to in the closing statement?

Q. Yes.

A. The purchaser.

Q. As far as you know you were not there and don't absolutely know?

A. No, Sir. As far as I know, the other individual who was with the Company at that time who closed the transaction prepared the statement.

Q. The statement is not signed; is it?

A. No.

Q. There may have been a corrected closing statement; could there not have been?

A. I would not think so, due to the fact that the amount indicated to close the transaction as appears on that statement, that was met.

Q. Do your records show that you made a gross error in the total in the amount of taxes due?

A. I haven't discovered one.

[fol. 85] Q. Had you looked?

A. I haven't checked that form.

Q. Did the record disclose that you, yourself, had to pay out money because of your own error?

A. As far as I have examined this file, it does not show that.

Q. But you don't know whether it does or not?

A. I am not positive. I can ascertain in just a moment.

Q. You don't know whether that is in here or not?

A. It is not.

Mr. Muskoff: We object to it.

The Court: Objection overruled. Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 9".)

The Court: Does that amount check with the check the Florida National Bank executive testified about?

Mr. Yerkes: Yes, Sir.

The Court: This is merely the closing transaction in connection with the bank testimony of the \$40,000 deposit?

Mr. Yerkes: Yes, Sir.

[fol. 86] Further Direct examination.

By Mr. Yerkes:

Q. I hand you a paper and ask you what that is.

A. This is a photostatic copy of the Dade Commonwealth Insurance Company deposit in the Florida National Bank, showing three checks were deposited on September 18, 1944.

Mr. Muskoff: I object to what they did with the money, and move to strike the testimony.

Mr. Yerkes: I offer this for the purpose of showing the downpayment of \$5,000. It is already in, but if the Court wants this in.

Mr. Muskoff: We object to it and object to the statement of what it shows, and move to strike counsel's statement on the ground that it doesn't tend to prove any of the issues in this case and it is a statement that the Government brought here from the Florida National Bank for the account of not Mr. Bryan, or anybody connected with Mr. Bryan, but with reference to the Dade Commonwealth Title Co.

The Court: I will sustain the objection and let it be filed for identification.

[fol. 87] (Same is marked; "Government's Exhibit No. 10 for identification".)

Q. I hand you a paper and ask you what this is.

A. This is a photostatic copy of deposit ticket of Dade Commonwealth Title Co. in the Florida National Bank.

Mr. Muskoff: We object.

The Court: The objection is sustained. Let it be filed for identification.

(Same is marked, "Government's Exhibit No. 11 for identification".)

The Court: The only thing that the Jury and I are interested in is the closing statement showing that the land in question cost \$46,000 and that the testimony of the bank witness, Florida National Bank, with references to the

\$40,000.00 deposit and the check against it for \$38,000.00, plus, relates to the same transaction and not a different transaction.

Mr. Yerkes: That's right.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

[fol. 88] MILLER R. ASKINS was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Askins, please state your name, and address.

A. Miller R. Askins, Birmingham, Alabama.

Q. Did you ever own any property known as Lot 3, Section 1, Hamby's Addition?

A. Yes, sir.

Q. Where is it located?

A. Over at Fernandina.

Q. Do you now own that property?

A. No, Sir.

Q. To whom did you sell it?

A. Baker Bryan and his wife.

Q. Do you know Baker Bryan?

A. I know him when I see him.

Q. How much did you sell that property to him for?

A. \$500.00.

Q. For Lot 3 of Section 1, Hamby's Addition?

A. Yes, Sir.

Q. Do you know of your own knowledge that after Baker Bryan purchased that lot whether or not he built a house on it?

A. No, I don't.

Q. You don't know?

A. No, Sir.

[fol. 89] By the Court:

Q. When did you sell that property?

A. 1939.

Q. For how much?

A. \$500.00.

Mr. Muskoff: I move to strike the testimony as being immaterial and irrelevant.

Mr. Yerkes: I don't want to talk too much before the Jury, but may I tell the Court why I offered it, to show the value in 1939 as against the subsequent sale.

The Court: I will hold your motion in reserve and unless it is tied in with this case I will grant it and instruct the jury to disregard it. If he has gotten the cart before the horse in this evidence, let's don't lose time in trying to switch that around in the right position. Are there any further questions?

Mr. Muskoff: None, whatsoever.

(Whereupon, the witness was excused.)

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[fol. 90] J. M. ASKINS was called as a witness on behalf of the United States and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Askins, please state your name.

A. J. M. Askins, Joseph M.

Q. Where do you live?

A. Fernandina, Florida.

Q. Did you ever own Lot 1, Section 1, of Hamby's Addition to Fernandina Beach?

A. I handled that down there for my sons; two of them, lots 1 and 3.

Q. To whom did you sell that Lot 1?

A. I sold it to Baker Bryan and his wife.

Q. Baker Bryan and his wife?

A. Yes, sir.

Q. And that was during approximately July, 1938?

A. Yes, in 1938.

Q. Do you know Baker Bryan?

A. Yes, sir.

Q. He is sitting over there?

A. Yes, sir.



Q. How much did you sell that lot for?

A. I sold him one for \$650 and one for \$500, for my sons.

Mr. Muskoff: We object.

[fol. 91] The Court: Objection overruled.

Q. How much did you sell it for?

A. For Robert W. Askins, sold him Lot No. 1 for \$650; and for Miller R. Askins, Lot No. 3, for \$500.

By the Court:

Q. That transaction was in 1938?

A. Yes, Sir.

The Court: The motion that went to the other testimony will also stand as to this testimony and I will reserve ruling on it.

By Mr. Yerkes:

Q. Have you lived pretty much continuously in Fernandina and Fernandina Beach for the last period of years?

A. I lived there since 1923.

Q. You are still living there?

A. Yes, Sir.

Q. You are familiar with these two lots: Lot 3, Section 1, Hamby's Addition; are you?

A. Yes, Sir.

Q. I ask you whether or not after that property was sold to J. Baker Bryan whether it was improved.

Mr. Muskoff: Object to the question, unless it states a definite time.

By the Court:

Q. Was it improved while it was owned by Mr. Bryan?

A. Mr. Bryan bought it and built a house on No. 3.

[fol. 92] By Mr. Muskoff:

Q. When?

A. I don't know the date when he built it, but after he bought it.

By Mr. Yerkes:

Q. How long after he bought it in 1938 would you say he built it?

A. Not very long. I just couldn't say how long. I just know he built after that, but don't know how long it was. I don't recall.

By the Court:

Q. Was a house built on the other lot?

A. No, there has never been no house built yet; still vacant, No. 1 is.

Q. What is your occupation?

A. I been fooling with the real estate business in Fernandina.

Q. All that time?

A. That's about all I have done.

Q. Did you have an occasion to inspect that building built on Lot No. 3?

A. I don't understand.

Q. Did you have an occasion, or did you examine that house, or inspect that house that was built on Lot 3?

A. To inspect it?

Q. Yes.

A. Well, I was in the house after it was built, several times.

Q. As a real estate man, what would you say was the value of that improvement that was put on that property?

[fol. 93] Mr. Muskoff: Object to that; he didn't say some date.

Q. As of that time, 1939?

The Court: Objection sustained. I hope you have some better evidence as to the value of the building than this witness can give.

Cross examination.

By Mr. Muskoff:

Q. How were you paid for those lots?

A. By Mr. Bryan?

Q. Yes.

A. He paid cash for them.

Q. Did he give you a check or money?

A. I don't recall. I handled it for my sons and signed the deeds and sent the money to them.

Q. You don't know whether he gave you cash, hard money, or check?

A. I just couldn't say. I know he paid for them and I sent the money to my two sons in Alabama, Huntsville; they were living there at the time.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

[fol. 94] ROBERT W. ASKINS was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name, and address.

A. Robert W. Askins; 1400 Carter Hill Road, Montgomery, Alabama.

Q. I ask you whether or not you ever owned Section 1, Lot—

Mr. Muskoff: I object to that; it is repetition. He has put the same thing in here several times.

The Court: Is this the owner of the lot?

Mr. Yerkes: Yes, Sir.

The Court: What do you want to show by this witness?

Mr. Muskoff: This is the third witness we have had on this same transaction.

Mr. Yerkes: No, we have two lots and each of them owned a lot.

[fol. 95] The Court: I don't think we need this witness.

(Whereupon, the witness was excused.)

HERBERT WILLIAM FISHLER was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Herbert Wm. Fishler.

Q. Where do you live?

A. Fernandina, Florida.

Q. What is your profession.

A. Attorney.

Q. Do you know the defendant, J. Baker Bryan?

A. I do.

Q. Did you ever own Lot 5, Section 1, Hamby's Addition to Fernandina Beach?

A. I did.

Q. Do you have some records to refresh your recollection?

A. A memorandum.

Q. I ask you whether or not on or about September 13, 1940, you disposed of that Lot 5, Section 1, Hamby's Addition to Fernandina Beach?

A. That was the date I made the actual conveyance; I purchased it a year or so before, under contract.

[fol. 96] Mr. Muskoff: I object to the testimony on the same grounds; this was 1940 and he purchased it years before.

The Court: I will hold your motion in reserve and I am going to tell the Jury right now that unless it is tied in they will disregard it.

By Mr. Yerkes:

Q. How much was the purchase price of the property?

A. Five Hundred Dollars.

Q. Now, I will ask you subsequent to that time that you sold that lot, whether or not Lot 5, Section 1, together with Lots 1 and 3 of Section 1 of Hamby's Addition to Fernandina Beach, were sold or conveyed by J. Baker Bryan to N. J. Wooten and J. F. Askin, as a part consideration of property of the City of Fernandina?

Mr. Muskoff: The deed, itself, will be the best evidence.



By the Court:

Q. Did you, as attorney, handle the transaction involved in that sale?

A. I owned an undivided  $\frac{1}{4}$  interest and held a declaration of trust in another undivided  $\frac{1}{4}$  interest.

The Court: I will overrule the objection.

A. Yes, Sir.

[fol. 97] Q. Just tell the Jury what that transaction was.

A. Those three persons named owned the West Half of Lots 1, 2, 3 and 4 of Block 1, Fernandina, on which was located a two-story frame building and there was an original mortgage of \$6,000 which had been reduced to \$4,000, and we exchanged that property subject to the mortgage to Mr. Bryan and his wife for those lots at Hamby Beach, together with a note in the principal sum of \$1200.

Q. What did you value Lots 1, 2, 3 and 4 of Block 1, City of Fernandina at the time of the transfer?

Mr. Muskoff: Object to that; he is not qualified as an expert. What he valued that at is a matter of opinion.

Mr. Yerkes: I will change that.

Q. What were they valued at—

The Court: What you want to know is the price at which each lot was included in that transaction?

Mr. Yerkes: Yes, Sir.

By the Court:

Q. Do you have the price, separately, for each one?

A. It was a white elephant we were trying to unload and we felt we made the best trade we could. We swapped [fol. 98] this building and took a house and note. The house was free and clear of all encumbrances.

By Mr. Yerkes:

Q. Do you know the value of that house?

Mr. Muskoff: Object to that.

The Court: Objection sustained.

By the Court:

Q. Insofar as the property you got from him was concerned, you didn't value each item separately, you didn't allow a separate amount for each item?

A. No, we took those two items in exchange for the building.

Q. And you got rid of a white elephant, and whether or not you got one is a question.

A. Yes, Sir.

Mr. Yerkes: I want to know at what figure they traded at, if he knows.

The Court: You are asking him what the selling price was of the lot with the buildings on?

Mr. Yerkes: Yes, Sir.

[fol. 99] By the Court:

Q. Did you fix the selling price?

A. No, sir. Mr. Askins was the real estate man involved in this deal and he did all the trading and I just said, "Yes".

By Mr. Yerkes:

Q. Can you testify from your records whether or not there was a mortgage on this building at the time?

A. Yes, Sir.

The Court: He has already done so. \$4,000 at the time of the deed.

Q. And did Mr. Bryan give you a note, or otherwise?

A. For \$1200 in addition.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. You say you sold a lot to Mr. Bryan for \$500?

A. Yes, sir.

Q. Did he pay you in cash or by check?

A. I think he paid most of the bills by check. He was living in Jacksonville and I was in Fernandina and he would mail it to me and I would give him a credit on his contract.

[fol. 100] Mr. Muskoff: That's all.

Redirect examination.

By Mr. Yerkes:

Q. Who held that \$4,000 mortgage?

A. Gulf Life Insurance Co., as well as I remember.

Q. When was this ~~note~~ for \$1200 paid?

A. When was it paid?

Q. Yes.

Mr. Muskoff: Object; it depends on who paid it. We got the cart before the horse again.

By the Court:

Q. When was it paid?

A. December 22, 1944.

Mr. Yerkes: Your witness.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

[fol. 101] Mrs. CAROLINE FRANCIS was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Mrs. Caroline Francis.

Q. By whom are you employed?

A. By the Gulf Life Insurance Company.

Q. By whom were you employed during the years 1942 and 1943 and 1944?

A. The Gulf Life Insurance Company.

Q. What is your position?

A. I am Assistant Cashier in the Mortgage Loan Department.

Q. As such assistant cashier in the Mortgage Loan Department, are you familiar with the records of the Company as to payments made upon mortgages?

A. Yes, Sir.

Q. Did you bring certain records over here today?

A. Yes, sir.

Q. Let me see those. (Witness hands over documents.)  
I hand you a paper marked, "Mortgage Loan Ledger Sheet" and ask you what that is.

The Court: Let's see if we can't save time on this proposition. You brought this witness to prove that \$4,000 payment by the defendant?

[fol. 102] Mr. Yerkes: Yes, sir.

Mr. Muskoff: I object to the entry. This card shows a lot of payments many years before this thing came up.

The Court: All I want to know is that this witness has been brought over to show that this defendant paid \$4,000 balance due on the mortgage.

Mr. Muskoff: It was paid over some time, but eventually this property was traded off on some other property; in other words, "traded". How much was paid to Baker Bryan I don't know.

The Court: All this Court is interested in is the amount of payment made on this mortgage by this defendant. You gentlemen could stipulate with reference to that.

Mr. Muskoff: He thinks the mortgage was paid out before he traded.

Mr. Yerkes: That is what we want to get out, whether the mortgage was paid off in the period of 1943, 1944 and 1945.

[fol. 103] The Court: Go ahead with the witness. Before we start with this witness, let's fix the date this defendant acquired that property.

Mr. Yerkes: 1940.

The Court: The other witness testified as to the date and testified the amount due was \$4,000 at the time of the transaction. Now, take up from that point on.

By Mr. Yerkes:

Q. Just testify first what payments were made on that mortgage for 1941.

A. Do you want me to read all of that? I can bulk them by the year.

The Court: Bulk them for 1941, 1942, 1943 and so forth.

Mr. Muskoff: I object to the testimony unless it shows who made the payments.



By the Court.

Q. Do you specify who made the payments?

A. No, we don't keep a record exactly on who made the payments. As far as we know, the payments were made by Mr. or Mrs. Bryan.

[fol. 104] By Mr. Muskoff:

Q. Are you in that department where they make the payments?

A. Yes, sir.

Q. You have no record of who makes the payments?

A. No, we take them in at the window.

The Court: Do you want me to make Mr. Yerkes go to a little more trouble to prove this? If you do, I am going to sustain you and make him do it.

Mr. Muskoff: The record is complete—

The Court: The record is complete as to the record of the amounts of payment made in 1941, 1942, 1943 and that's all he has asked her for.

Mr. Muskoff: It is not as simple as it looks. It is not a question of proving how much he or she paid, or somebody paid, during that period. There is a lot more to it than that. This is not for that purpose.

The Court: We don't want any testimony to get before this jury that is improper; and, on the other hand, I don't want any delay—

[fol. 105] Mr. Yerkes: All we want to know is what the payment of the mortgage was for those four years.

Mr. Muskoff: You don't want to tie it in with any other transaction?

Mr. Yerkes: We are tying it in with the case as a whole.

The Court: Is there any question as to the defendant's owning the property for the period in question? Now, Mr. Yerkes, you have not shown yet when he disposed of this property, and until you do I am going to have to sustain Mr. Muskoff's objection.

Mr. Muskoff: Let it go in.

By the Court:

Q. Give us the amount paid on that mortgage during the years 1941, 1942 and 1943.

A. 1941, \$573.11. Did you want the interest and principal split?

Q. Yes, if you have it split.

A. Interest amounted to \$398.07; the amount applied to principal was \$1,000. I don't have the total amount, but you can add those two.

Q. What is the total amount paid on principal and interest?

A. \$1,398.07.

[fol. 106] Q. That was in 1941?

A. Yes.

Q. What was the total in 1942?

A. \$1,162.51.

Q. Go ahead.

A. There was \$1,372.67 applied to principal and \$163.82 to interest in that year, 1943. In 1944, there was \$98.42 interest and \$1,000 principal.

Q. What was the balance due at the end of the year?

A. \$999.76; that was the balance at the end of 1944.

#### Cross-examination.

By Mr. Muskoff:

Q. You don't know when Mr. Bryan sold or traded that property?

A. Our records don't indicate. We have some tax receipts in here that were issued to him in 1942. Before that, we don't have the tax receipts. Of course, if he paid the taxes himself we would not have the receipts; but our records don't indicate when the mortgage was assumed by Mr. Bryan.

Q. The first indication you have is 1942, when he paid the tax receipts?

Q. You don't know whether he sold that property later, or before 1944, or traded it?

A. No, it was paid out in March of 1945.

Q. You don't know whether he traded it prior to that time?

A. No; we have a receipt for the papers, but don't know who it was that signed for the final papers. It was not Mr. Bryan.

[fol. 107] Q. When it was finally transferred out, it was not Mr. Bryan?

A. I mean somebody could have signed for him.

Q. Did you deliver the papers to Mr. Bryan, or who?

A. We don't remember who the papers were delivered to; they are delivered to whoever brings the check in; it could have been a messenger.

Q. You don't know whether Mr. Bryan held it at that time, or not?

A. No, sir.

Mr. Muskoff: That's all.

The Court: I will handle this testimony the same way I have handled all the other testimony.

(Whereupon, the witness was excused.)

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PAUL F. HOFFMAN was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Hoffman, please state your name.

A. Paul F. Hoffman.

Q. Where do you live?

A. 3420 St. Johns.

[fol. 108] Q. I will ask you whether or not you ever owned the Esquire Club in Fernandina?

A. Yes, I do.

Q. From whom did you purchase it?

A. Baker Bryan.

Q. Have you any records there with you to indicate?

A. Yes. This (indicating) is the closing statement that Mr. Katz, my attorney, and John Harrell, his attorney, drew up.

Q. This is the closing statement when you purchased the Esquire Club at Fernandina from Mr. Bryan?

A. We just swapped; no purchase.

Q. At the time you swapped, did you have an accurate value on the Esquire Club and the property you swapped for it?

A. He didn't have any value at all. They just swapped, but on the closing statement they put this value down.

By the Court:

Q. Who is "they"?

A. The attorneys.

Q. Your attorneys or Mr. Bryan's attorneys?

A. Mine and his both.

Mr. Yerkes: The Government offers this closing statement in evidence.

Mr. Muskoff: Object to that upon the ground that Mr. Bryan or nobody else is bound by a bookkeeper's or lawyer's [fol. 109] way of striking a balance. Here is a man who stated he had no value whatsoever placed on the property at the time.

The Court: The objection, insofar as the amount is concerned, is all right; but as to the matter of showing the transaction—

Mr. Yerkes: I hand this witness a statement to refresh his recollection.

Mr. Muskoff: Object to the witness being handed a statement that was prepared by someone other than himself.

The Court: It is not going in evidence.

Mr. Muskoff: I want him to tell from his actual memory of it.

The Court: We all have to examine our witnesses before we call them to the stand and can make notes as to what the testimony will be. I don't consider that harmful in any sense. The only thing this witness can testify about is the nature of the property that he sold and exchanged with Mr. Bryan and any outstanding indebtedness that he might have assumed on the Bryan property and that Mr. Bryan might have assumed on his property, and that statement is worth nothing, otherwise, than for that information. [fol. 110] Mr. Yerkes: It is offered for that purpose.

The Court: He can use that to testify, but you can't offer it in evidence.

Witness: I didn't assume any indebtedness, but he did.

By the Court:

Q. What was it you traded him?

A. I traded him a building on Bay & Newnan for a bar and cottages, kind of a tourist camp, over at Fernandina.



Q. You traded him a building in Jacksonville for a tourist camp and some cottages and bar in Fernandina?

A. Yes, sir.

By the Court:

Q. Your testimony is that there was no indebtedness on the property you acquired from Mr. Bryan; you got it free and clear of indebtedness?

A. Yes, sir.

Q. You didn't fix any price for it?

A. No, sir.

Q. You traded him a building here in Jacksonville, and what indebtedness did he assume when he took that over?

A. Sixteen Thousand—

[fol. 111] By Mr. Muskoff:

Q. What are you testifying from?

A. From my statement that I made.

Q. Who furnished those facts and figures in that statement?

A. I took them off my books.

By the Court:

Q. Go ahead.

A. He assumed \$16,147.12.

Q. That was in debts against the property he got here in Jacksonville?

A. Yes, sir.

By Mr. Yerkes:

Q. You say that was the property here in Jacksonville, at what streets?

A. Bay and Newnan.

Q. What was that property known as?

A. The agency of the Kaiser-Frazer Motor Co.

Q. What was the Lot number?

A. So help me, I don't know.

Q. Who was the attorney involved in the closing?

A. Katz and Katz; Hyman Katz. Here is the legal description; Lot 3, Block 2, Hart's Map of Jacksonville.

Q. That is at Newnan and Bay Streets, the northeast corner; is it not?

A. Yes, sir.

Q. There was how much mortgage on that property?

A. \$16,147.12.

[fol. 112] Q. Is that the mortgage you had placed on it?

A. No, I assumed it. I mean I paid it down to that.

Q. How much did you originally pay for that property?

Mr. Muskoff: Object to that; it is immaterial and irrelevant.

The Court: Objection sustained.

Q. What did you swap him for that.

Mr. Muskoff: He already testified to that.

A. A place over in Fernandina.

Q. What was the description of that?

A. Lots 8, 9, 10, 11, 12, 13 and 14, Askins Five-Points, according to Plat Book 1st, page 58.

Q. That was in Fernandina, Florida?

A. Yes, sir.

Q. That was the Esquire Club?

A. Yes, sir.

Q. Was that being operated at the time you took it over?

A. Yes, sir.

By the Court:

Q. When was that transaction closed?

A. 1944. I can give you the exact date. January 28, 1944, or at least approximately that date. Here it says that it was deeded in January, 1944.

[fol. 113] Cross-examination.

By Mr. Muskoff:

Q. That property down there at Bay and Newnan that you traded for that, does that look the same today as when you had it?

A. No; he spent plenty of money fixing it up.

Q. It was pretty well run down when you traded it?

A. That's right.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

(Whereupon, a recess was had at 4:35 P. M. until 10 o'clock A. M. Wednesday, July 7, 1948, at which time Court reconvened and the following proceedings were had:)

GEORGE HOLLAND was called as a witness on behalf of the United States, and, having been first duly sworn testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Holland, please state your name.

A. George Holland.

Q. Where do you live?

A. Detroit, Michigan.

[fol. 114] Q. Where were you living during the year 1944, and prior thereto?

A. In Jacksonville.

Q. Do you know this defendant, Baker Bryan?

A. I just met him yesterday, the first day.

Q. Did you ever purchase property known as the Seminole Club?

A. Yes, sir.

Q. Where was that located?

A. Up near the jetties there. I don't know what you call it.

Q. That big place at the runway?

A. Yes, Seminole Avenue.

Q. Did you bring any records with you?

A. No, I didn't.

Q. You don't have any records?

A. No, I discarded all of them.

Q. Do you know that Lot and Block number there?

A. No. Seminole Beach is all I know.

Q. And that was known as the Seminole Club?

A. That's right.

Q. Would you know the description of it if I gave it to you?

A. I probably would.

By the Court:

Q. Let's ask him this question: Did you buy the land and building and everything that went with it?

A. Yes, sir.

Q. How much did you pay for it?

A. Nine Thousand Dollars.

[fol. 115] Mr. Muskoff: Object to that. Find out when.

By the Court:

Q. When did you buy it?

A. I think it was in 1944.

Q. Was it on February 12, 1944?

A. I come down every winter and it was in the winter time; I am not positive of what time or month it was.

Mr. Muskoff: I object to counsel putting words in the witness' mouth. I don't know how far it is going. That is an improper question.

The Court: Objection overruled.

By Mr. Yerkes:

Q. How much did you pay for it?

A. I didn't pay it in full; it was \$9,000 value and I got credit for \$4500. I put in \$5,500 all told.

Q. You put in \$5,500?

A. That's right.

Q. And you took what else in the trade?

A. I don't understand it.

Q. Well, what was the rest of the purchase price?

A. I put \$9,000 in it. It was turned in for that place out at Englewood and I got the value of \$4,000 for that, and added \$1,000 to it and made one payment and it was \$500.

[fol. 116] Q. You made one payment to whom?

A. The representative at the bank. I don't know what bank it was.

Q. In other words, to whose credit did you put it?

Mr. Muskoff: Object to that.

By the Court:

Q. Were you buying this property?

A. Yes, sir.



Q. From the defendant, here?

A. Yes, but not directly, of course.

By the Court:

Q. He had an agent?

A. Yes, it was in his name.

Q. And your testimony is that you paid him \$5,500 cash?

A. No; the value in what I got for Englewood, which was \$4,000; and then I gave him \$1,000 on top of that; and the year following I owed a \$500 payment and I paid \$5,500 all told, but still owed him the difference.

Q. You gave him a piece of property that was valued at \$4,000?

A. That's right.

Q. And in 1944 you gave him \$1,000 cash?

A. That's right.

Q. And the following year you gave him \$500?

A. That's right.

Q. Now, that \$5,000 was in the form of a mortgage; wasn't it?

[fol. 117] A. Yes, sir.

Q. And you paid \$500 on that mortgage, leaving a \$4,500 mortgage due on the property deeded from you to Mr. Bryan; is that right?

A. I think it would be \$3,500.

Q. From you to Mr. Bryan?

A. Yes, that's right.

Mr. Muskoff: Then I move to strike that testimony for the simple reason that he says it was 1944; he didn't pay that money, a portion of it, until 1945. That is not involved.

The Court: I think it would be unfair to your own client if I granted that motion you just made. If you insist on it, I will.

Mr. Muskoff: I withdraw it.

The Court: I gained the impression that he got the \$500 in cash in January, 1944.

Mr. Muskoff: I don't gain that impression.

The Court: But the subsequent testimony shows that he didn't; it shows that he only got \$1,000 in cash in 1944 and I think the Jury understands it now. He only got cash of \$1,000 in 1944 and a mortgage for the balance, which was not paid until 1945.

[fol. 118] Mr. Yerkes: Your witness.

## Cross-examination.

By Mr. Muskoff:

Q. Who placed the value of \$4,000 on the property you traded?

A. Well, the man who was representing Mr. Bryan.

Q. Was there any agreement to prove up that fact; I mean, did you actually place the value of \$4,000 on that?

A. That's right.

Q. Or did you just get it for so much money and that piece of property?

A. That's right.

Q. And you stated the property was worth \$4,000?

A. That's right.

Mr. Yerkes: The witness has testified that Mr. Bryan's agent valued it at \$4,000.

Mr. Muskoff: I move to strike any reference to Mr. Bryan's agent, whatsoever. You can't prove agency by merely taking a statement from a man, and that's all we have.

The Court: Motion denied.

Q. What was the man's name that was Mr. Bryan's agent?

A. You can see it in the records.

[fol. 119] Q. Do you know his name?

A. I think it was "Burg", if I am not mistaken.

Q. And you had a piece of property, where?

A. Englewood.

Q. What was on it?

A. A house and about an acre of land.

Q. How much was it rented for?

Mr. Yerkes: I think that is immaterial.

By the Court:

Q. What was it renting for?

A. \$15 a month.

Q. Fifteen Dollars a month?

A. Fifteen Dollars a month?

A. That's right. I gave it to him for \$15 a month and he was to take care of it as caretaker.

Q. And it was renting for that amount of money?

A. That's right.

Q. That would be how much a year?

The Court: You don't have to go into that mathematics.

Mr. Muskoff: I would just like to show the Jury what \$15 a month on \$4,000—.

Q. Who made the repairs on the place?

A. I did.

Q. You made the repairs on the place?

A. Yes, sir.

[fol. 120] Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

M. H. DAWSON was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. M. H. Dawson.

Q. Where do you live?

A. 1531 Walnut Street.

Q. Do you know this man sitting here, Baker Bryan?

A. Yes, Sir.

Q. Did you have a transaction with him during the year 1942?

A. Yes, Sir.

Q. What was that transaction?

A. Retail liquor store license and rooming house combination.

Q. What was that known as?

A. Pete Dawson's Tavern, at 21st and Talleyrand Street.

Q. You sold that?

A. Yes, Sir.

Q. For how much?

A. \$4200 cash.

[fol. 121] Q. That included the place of business?

A. Place of business, stock, license, ten rooms of furniture and everything in the place.

Mr. Muskoff: Now, the date has not been fixed, except 1942; that is as near as we come to it. When was it in 1942; I think we ought to know.

By the Court:

Q. Can you give us the date?

A. July 29, 1942.

By Mr. Yerkes:

Q. How was that money paid you?

A. By check. I forgot what bank, but I deposited the check; the check was written payable to me, signed by his wife, and I deposited it in the Springfield Bank where I do business and I have copies of the deposit.

Q. Let me have those.

A. I have the bank statements showing where it was deposited here and also these duplicate bank statements.

Mr. Yerkes: We now offer in evidence the duplicate certificate of deposit slips for \$4200.

Mr. Muskoff: I would like to ask the witness a question or two, if your Honor please.

The Court: All right.

[fol. 122] Cross-examination.

By Mr. Muskoff:

Q. This is not a slip that you got at the time you made the deposit?

A. No, the bank keeps those.

Q. You don't have a duplicate slip then?

A. No, Sir.

Q. You had a request from the Government and you went and got these?

A. I went to the bank and asked Mr.——.

Q. Who asked you to get these?

A. The government asked me to bring all my files and records on this transaction.

Q. Did they ask you to get a duplicate deposit slip?

A. No, Sir.

Q. This is something the bank made up when you went and asked them?

A. Yes, Sir.



**Q.** When did you get this?

**A.** I had a subpoena to come up here; this was June; I had a subpoena about a month ago to appear here and then I got a notice that the case was postponed.

**Q.** Did you show this to Mr. Yerkes and tell him that you got it beforehand?

**A.** No, Sir.

**Mr. Muskoff:** Object to this, it is not a proper record.

**The Court:** Objection sustained.

[fol.123] **Mr. Yerkes:** Your witness.

**Further cross-examination.**

**By Mr. Muskoff:**

**Q.** You had a going business that you sold?

**A.** Yes, Sir.

**Q.** A retail liquor license?

**A.** And whiskey. There was a licensed stock of whis-kies, fixtures, cash registers, stoves, pots and pans and all these rooms of furniture; everything upstairs to that room-ing house, kerosene stoves and another stove.

**Mr. Muskoff:** That's all.

**Redirect examination.**

**By Mr. Yerkes:**

**Q.** Do you know whether Mr. Bryan continued business at that place?

**A.** Yes, Sir.

**Recross examination.**

**By Mr. Muskoff:**

**Q.** For how long?

**A.** I would say less than six months and he had the license transferred to a south side location.

**Q.** He had the license transferred; it was some short time?

[fol.124] **A.** Yes, he transferred the license to the old South Side Bank Building.

**Q.** He had the South Side license transferred over there?

**A.** Yes, Sir.

Q. And all the furniture, and so forth, he didn't run any rooming house or anything like that?

A. I think he sold it and moved out.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

LOUIS BONO was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Louis Bono.

Q. Where do you live?

A. 2211 Belo Place.

Q. Do you know the defendant, Baker Bryan?

A. Yes, Sir.

Q. Did you ever buy a lease and fixtures from him?

A. Yes, Sir.

Q. Just testify about that.

A. I bought a lease from him for \$1,000 and some fixtures for \$200.

Q. Where were they located?

[fol. 125] Mr. Muskoff: Object to that until he says a time.

Q. When was this transaction?

A. November, 1943.

Q. Go ahead and testify, where was this property located?

A. At Miami Road and Hendricks Avenue.

Q. South Jacksonville?

A. Yes, Sir.

Q. What was the consideration there?

A. \$1,000 for the lease and \$200 for the fixtures.

Q. What was the place called?

A. The place that I owned, or Mr. Bryan owned?

Q. That Mr. Bryan owned.

A. The place had been called the "Horseshoe Bar", I believe.

Q. And did it remain the "Horseshoe Bar"?

A. No, Sir.

Q. What did you name it?

A. Louis' Bar & Grill.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. You are sure that was in 1943?

A. Yes, Sir.

Q. Wasn't there some tiling in that place?

A. Tiling?

Q. Tiling and Linoleum?

[fol. 126] A. Linoleum on the floor; yes.

Q. What was the value of that?

A. I don't know, Sir.

Q. You say you bought that in 1943?

A. Yes, Sir.

Q. Do you know, or not, whether that was the same fixtures that Mr. Bryan had bought from Pete Dawson?

A. I don't know anything about where Mr. Bryan got them from. They were in the building when I bought his lease.

Q. You don't know what he paid for the lease?

A. What I paid for the lease?

Q. What Mr. Bryan paid for the lease?

A. No, Sir.

Q. What was the date of the lease?

A. The date that I took over the lease?

Q. No, the lease that you took over; what was the term of the lease that you took over from Mr. Bryan?

A. I took the lease over in 1943; I think around November.

Q. I mean how long had the lease gone and how long was it——?

A. I don't know. Mr. Bryan at that time was leasing from Fred Mulliken.

Q. You don't know what he paid for the lease, or how long he had it?

A. No, Sir.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

[fol. 127] GLEN C. MONROE, JR. was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Glen C. Monroe, Jr.

Q. Where do you live?

A. Jacksonville, Florida.

Q. By whom are you employed?

A. Florida National Bank of Jacksonville.

Q. How long have you been so employed?

A. Twelve years.

Q. What official position do you hold with them at this time?

A. Assistant Cashier.

Q. How long have you held that position?

A. Since the first of the year; January.

Q. Have you received a subpoena duces tecum to bring certain records with you?

A. Yes, sir.

Q. Have you those records?

A. Yes, sir. Which cards do you want?

Q. Showing the total deposits and withdrawals of each year for 1941, 1942, 1943 and 1944.

A. Do you mean in the regular checking account?

Q. Yes.

A. In the subpoena it didn't say to get the totals; it said to bring the ledger sheets which we have on all debits and credits.

[fol. 128] Q. Let me see the record for 1941.

A. We have two accounts here; a special account and a regular.

Q. Give me the regular account first, and then the special account for 1941.

A. It starts with 1940 on the other side, but 1941 starts right here.

Q. What are these papers you have handed me?

A. The record of the amount of money deposited in the account of Mrs. Evelyn Bryan and also the checks written for the period of 1941.



Mr. Yerkes: We offer in evidence the records just testified about.

Mr. Muskoff: Object on the ground that they don't show they are the records of Baker Bryan.

The Court: Objection overruled.

Mr. Muskoff: The second objection is that one of them is a special account for some special reason.

By Mr. Yerkes:

Q. This (indicating) is the regular account?

A. Yes, sir.

The Court: We haven't come to the special account yet.

[fol. 129] Mr. Muskoff: May I ask a question?

The Court: Yes.

Cross examination.

By Mr. Muskoff:

Q. Part of these accounts are for 1940; are they not?

A. In running an account in the bank we don't stop on the ledger sheet; naturally, we do on the statement sheet that is issued to the customer every first of the month, but on the ledger sheet it is a continuation of the person's account and when you go from one year to another we don't start a new sheet. You can see where it starts 1941.

Q. A portion of it is 1940?

The Court: He testified to that on direct, and it is only offered insofar as it is applicable to 1941.

By Mr. Muskoff:

Q. You don't know what business this is for?

A. Not the slightest.

Q. You have not the slightest idea in the world?

A. No, Sir.

Q. The account was in the name of Evelyn Bryan?

A. Mrs. Evelyn Bryan.

[fol. 130] Q. Do you know upon whose signature you would recognize the checks; would you recognize hers or someone else's?

A. No one but hers. She signed the signature contract, which is a contract between she and the bank to recognize no signature except the way the account reads.

Mr. Yerkes: I don't think at this time he should go into cross-examination. I intend to bring out all these things.

The Court: Have you any further objection?

Mr. Muskoff: I have the additional objection that Mr. Bryan has no connection with this account, whatsoever.

The Court: Objection overruled. Let it be received in evidence as Government's Exhibit. (Same is marked, "Government's Exhibit No. 12").

By Mr. Yerkes:

Q. Now, have you the Special Account for 1941?

A. No. In the subpoena it stated for the records between 1941 and 1944. The Special Account of Evelyn Bryan, Special, was opened September 21, 1942. It was opened in our bank at that time, so there is no record of a '41 deposit.

Q. There was none in 1941?

A. None.

[fol. 131] Q. Go to your 1942 or the regular account.

A. I have it here. (Produces ledger sheets.)

Q. And for the record, please state what those papers are that you are handing me.

A. Just the regular checks and deposits; checks written against the account and the deposits.

Q. This is a record of that?

A. Yes, Sir.

Q. What are these sheets called?

A. Mrs. Evelyn Bryan's ledger sheets for the year 1942.

Q. And there may be some run over from 1941 in here?

A. No, there may be a run into 1943 there.

Further Cross examination.

By Mr. Muskoff:

Q. This account is again in the name of Evelyn Bryan?

A. Yes, Sir.

Q. The defendant here could not draw on that account?

A. Not a check; not a thing.

Mr. Muskoff: The same objection.

The Court: Objection overruled; let it be received in evidence.

(Same is marked, "Government's Exhibit 13".)

[fol. 132] Further direct examination.

By Mr. Yerkes:

Q. You say a Special Account was opened in 1942?

A. September 21, 1942.

Q. You are handing me some papers; what are they?

A. They are also the ledger sheets of Evelyn Bryan, Special, and checks written against the account, and also the deposits. Naturally, 1943 runs into that sheet.

By The Court:

Q. Have you got them there for 1942, 1943 and 1944, Special?

A. Yes, I have the Special from the time it was opened until it was closed.

Q. When was it closed?

A. October 11, 1943.

Q. It was opened in 1942 and closed in 1943?

A. Yes, Sir.

By Mr. Yerkes:

Q. What was this card on the front?

A. The signature card that the person signs; the contract with the Bank, that the Bank files.

Mr. Yerkes: I will offer in evidence the ledger sheet and the signature card of Evelyn Bryan, Special, which the witness has just testified about.

[fol. 133] Further cross-examination.

By Mr. Muskoff:

Q. You don't know what this Special Account was used for?

A. No, Sir.

Q. Mr. Bryan could not draw on that?

A. No, he could not. You don't know that it had any connection, whatsoever, with Mr. Bryan's business?

A. Not a bit in the world.

Mr. Muskoff: Object on the same grounds.

The Court: Objection overruled. Let it be received in evidence.

Mr. Yerkes: I am offering the 1943 and 1944 accounts together.

(Same are marked, "Government's Exhibit 14".)

Further direct examination.

By Mr. Yerkes:

Q. Have you the 1943 and 1944 ledger sheets?

A. I have.

Q. Do you have the ledger sheets of the account of Mrs. Evelyn Bryan, representing deposits and checks written against the account for the years 1943 and 1944?

A. Yes, Sir. (Witness produces ledger sheets.)

[fol. 134] Mr. Yerkes: We offer these in evidence. If there is anything running into 1945 I don't offer that.

Mr. Muskoff: The same objection.

The Court: Objection overruled. Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 15").

Q. Have you the signature card of Evelyn Bryan on the regular account?

A. That is attached, I am quite sure.

Q. (Produces card). What is this card I have in my hand?

A. The signature card of the contract between Evelyn Bryan with the Florida National Bank.

Mr. Yerkes: I now offer the signature card of Evelyn Bryan on the regular account.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 16").

[fol. 135] By Mr. Yerkes:

Q. Where you requested to bring the signature card for certain boxes, safety deposit boxes?

A. Yes, Sir.

Q. Have you that with you?

A. Yes. I might say I have all of these in a photostatic copy, but you want the original, I guess.

Q. Yes.



A. Yes, I have these cards for Mrs. Evelyn Bryan. There are two different cards; this is the contract card (indicating) of Mrs. Evelyn Bryan, and this (indicating) is the entries into the box.

Q. Give me the contract card.

A. This is the card where J. B. Bryan, Sr. is a deputy to this box. In other words, he was able to enter into this box and Mrs. Evelyn Bryan also.

Mr. Yerkes: We now offer the contract card in evidence.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 17").

Q. What was the number of that box?

A. No. 258; and then you will see on the back that on September 27, 1943 Box No. 258 was exchanged for Box No. 565.

[fol. 136] Q. You say you have the record of entries?

A. We have a record of entries into the box from the period of 1941 through 1944. I think that is the time you want. The signed entries; the person who went into the box was her, from 1941 to 1944.

Mr. Yerkes: We offer the entry cards in evidence.

Mr. Muskoff: I would like to ask the witness a question.

The Court: All right.

Further cross-examination.

By Mr. Muskoff:

Q. Have you checked these cards?

A. Yes, Sir.

Q. Did anybody ever use the box but Evelyn Bryan?

A. Only Evelyn Bryan.

Q. This doesn't give a record of when the box was taken out?

A. That gives a record of when Mrs. Bryan—they take their box and they have a regular little room.—

Q. I mean when they first rented the box.

A. Yes, it is on there, the date it was opened; the first one would be the date.

Q. This is all the records you ever had with reference to Evelyn Bryan's safety deposit box?

A. The contract gives the date of opening; that is the first time she went into the box.

[fol. 137] Q. Did she ever have a box there previous to that time, that you know of?

A. Not that I know of. We were asked for the record of 1941 to 1944.

Q. And you immediately tried to get what the Government called for?

A. That's right.

Mr. Muskoff: The defendant objects to it on the ground that the record doesn't show that Mr. Bryan ever used the box in any manner, whatsoever.

The Court: Objection overruled. Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 18")

Q. Was there any safety deposit box in any other name?

A. Yes. We have a contract here with Mary Evelyn Bryan, only. She is the only one to sign on this one; Box No. 379.

Q. And that is the contract that you just spoke about?

A. That is the contract between the Bank and Mary Evelyn Bryan.

Mr. Muskoff: Same objection. This is Mary Evelyn Bryan.

By The Court:

Q. This is Mary Evelyn Bryan, exclusively, is that correct?

[fol. 138] A. Yes, Sir.

Q. Did the Box No. 258 and No. 565 run from November 4, 1940 until what date?

A. I think it is on the bank slip, September something, 1943, when they changed the number of the box.

Q. But when did they surrender the first box that they got.

A. 1943, Sir.

Q. And she got the second one?

A. Yes; I think it was just a change in boxes is all it was.

The Court: Objection overruled.

Mr. Muskoff: Let me bring that out a little.

Further cross-examination.

By Mr. Muskoff:

Q. During 1943 there were two boxes ~~at that bank,~~  
were there not; one of them was Mary Evelyn Bryan, only;  
and the other one was Evelyn Bryan?

A. Yes, Sir.

Q. But they were two separate and distinct boxes; one  
didn't merge into the other?

A. No, Sir.

By The Court:

Q. Did she keep the first box that she got in 1940 after  
she got the second one?

[fol. 139] A. Yes, it was merely just a change of boxes  
from one to another. It was the same account running all  
along.

Q. The two covers one.

A. Yes. Mary Evelyn Bryan, only, was opened in 1943  
and it was separate altogether; but the one that was opened  
in 1940, or whatever it was, we don't have the records for  
1940, she never gave that box up. When she gave that up  
we gave her another the same day. It was one box.

Q. That is, No. 258 and No. 565?

A. Yes, Sir.

Q. But she continued to keep No. 565, which was changed  
on September 27, 1943 from No. 258?

A. Yes, that's right.

Q. She continued to keep that after she took out her  
personal box of 379?

A. Yes.

The Court: Then I sustain your objection to the card for  
her personal box No. 379 that she took out in 1943.

Mr. Yerkes: At this time, may it please the Court, could  
I leave with the Clerk for identification exhibits certified  
copies of the originals?

The Court: I was going to direct him when you were  
through with the examination what he could do about it.

[fol. 140] Further direct examination.

By Mr. Yerkes:

Q. You were requested to bring a Cashier's Check; did you bring that?

A. Yes, I did. Our Cashier's Check, Florida National Bank, for \$40,000, payable to Baker Bryan, dated October 11, 1944, No. 250628, signed by Jos. H. Riggs, V. P.

Mr. Yerkes: We offer this cashier's check in evidence.

By Mr. Muskoff:

Q. Does this check state through what bank it cleared?

A. Yes, it cleared through the Florida National Bank & Trust Co. of Miami, October 16, 1944. That's the bank stamp on the back.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 19").

Mr. Yerkes: Your witness.

Further cross-examination.

By Mr. Muskoff:

Q. This, as I understand it, is the Special Account; is it not? (Indicating ledger sheet.)

A. Yes, Sir.

[fol. 141] Q. Will you tell the Jury what date that account was opened and the amount of the first deposit?

A. The account was opened September 21, 1942; \$5,000.00.

Q. Now, tell the Jury when the first withdrawal and the amount was.

A. September 24th, three days later, \$4,000.00.

Q. When was the next deposit?

A. September 28, 1942.

Q. How much was that?

A. \$2,225.34.

Q. It was opened on what date?

A. September 21, 1942.

Q. And the first withdrawal was?

A. For \$4,000, September 24th.

Q. The next deposit?



A. September 28, 1944, for \$2,225.34.

Q. The next withdrawal, or next deposit?

A. October 1st; withdrawal for the same amount of deposit on September 28th, \$2,225.34.

Q. Will you go on down and explain to the Jury just the amounts of the deposits and each one there was, how many days intervened between each withdrawal, or approximately?

The Court: The time is shown by the Exhibit itself.

Mr. Muskoff: I want to show that this was a special account set up in which money was habitually placed in, taken out, placed in, taken out.

[fol. 142] Mr. Yerkes: That is why we offered it.

Q. Do you know whether or not it was usual for people operating bars at that time to cash checks on paydays for shipyard workers and likewise?

Mr. Yerkes: I don't think that has anything to do with the issues.

The Court: Let him answer.

A. I happened to be in the Teller's cage before I went into the Service and that was just a general procedure all over the City of Jacksonville. It was nothing for Cheny's Bar, or so and so's bar to bring in a stack of checks this high (indicating) and cash them.

Q. And that was the procedure that was used in this account?

A. I don't know whether it was or not. I don't know anything about the account. I told you, just like I say, I was in the Teller's cage before I went into Service and that was the procedure exactly, that was the way the bars and all package houses operated. You know, yourself, that the checks would pour in there.

Q. The \$40,000 check, where did that money come from?

A. Where did it come from?

Q. You don't know?

[fol. 143] A. No, I don't know.

Q. They just brought in a \$40,000 check?

A. I don't have the slightest idea.

Q. They did come in and buy that check and take it down to your bank in Miami and cash it?

A. The check was bought in our bank, our own cashier's check; it was bought there and cleared through Miami.

Q. I hand you here Government's Exhibits No. 8 and No. 19, which is the \$40,000 cashier's check you just testified about, and ask you whether they are one and the same check.

A. Yes, they are.

Q. They are one and the same check?

A. Yes, sir.

Q. I ask you to refer to the deposit slip showing the deposit with the symbol "5".

A. 63-5, that is the number of our bank. 63 is the State number of all the banks in Florida and we are No. 5; that's what that "5" means. "63-5", Florida National Bank of Jacksonville.

Q. And that is the deposit of the same check?

A. Yes, sir.

By the Court:

Q. You said you had photostatic copies of all these exhibits?

A. Yes, sir.

Q. You may leave them with the Clerk here and as soon as this case is closed and we are through with them and you desire them you may secure an order for the filing of these photostatic copies and the withdrawal of these [fol. 144] originals from the files. You will contact Mr. Yerkes at that time.

A. Yes, sir.

(Whereupon, the witness was excused.)

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M. T. VICKERS was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Vickers, please state your name.

A. M. T. Vickers.

Q. Where do you live?

A. 1341 Belvedere; Jacksonville, Florida.

Q. By whom are you employed?

A. The Atlantic National Bank.

Q. What is your title?

A. Clerk in the Mortgage Department.

Q. You were requested to bring certain data with reference to a mortgage made May 1, 1943; have you got that?

A. Yes, sir.

Q. You have handed me a paper; what is this?

A. That is the mortgage; this (indicating) is the note that goes with it.

Q. What are these two papers you have handed me?

A. Those are mortgages and security notes for \$17,000; the mortgages and note dated April 28, 1943, signed by Paul F. Hoffman to Irma Hoffman through the Atlantic National Bank at Jacksonville.

[fol. 145] Q. Do your records show whether or not any other person assumed this mortgage after it was made?

A. My records show about February 2nd this mortgage was assumed by J. Baker Bryan and Evelyn E. Bryan.

Mr. Muskoff: Object to what his records show; the question is what is the fact here.

Mr. Yerkes: Those records are the facts, may it please the Court.

Mr. Muskoff: The mere fact that a bank states that I assumed a mortgage is no proof that I assumed the mortgage.

By the Court:

Q. Did they make the payments after that?

A. Yes, sir.

Q. You say February 2nd of what year?

A. 1944. How, I bring that out because all I have is a memorandum of the fact that Mr. Hoffman advise us that it was assumed by them, the insurance changed over to their name and notices sent to the Bryans' attorney.

Q. What address were they sent to?

A. February 2, 1944 instructions were given that the address would be given, care of the Skyway Club, Main Street Road. On May 29, 1945 the addressed was changed then.

Mr. Yerkes: We now offer this in evidence; the note and mortgage.

[fol. 146] Cross examination.

By Mr. Muskoff:

Q. This is more than a mortgage, this paper you handed here is more than a mortgage?

A. It has the record of the payments of the note itself.

Q. Which is in addition to the mortgage and note?

A. Yes. That is the record of the payments on the note.

Mr. Yerkes: I offer that as part of the same exhibit, or I will offer it next.

The Court: The only thing we are interested in in this case is the amount of the mortgage on the date it was assumed and the amount paid on it by this defendant and his wife in 1944. That is all we are interested in. We don't need to clutter up this record with these exhibits if we can get this information.

By the Court:

Q. Can you give us that information?

A. Yes, sir.

Q. The amount of the mortgage on the date this defendant and wife assumed it and the amount they paid on it in 1944.

A. The balance on February 2, 1944 was \$16,147.12.

Q. That is the amount on what date?

A. February 2, 1944, the date that they assumed that mortgage.

[fol. 147] By the Court:

Q. How much did they pay on the account, principal and interest, during 1944.

A. During 1944 they paid principal payments of \$1,322.66, and interest of \$777.34; a total of \$2,100, which was \$175 a month; that was the amount of the payments.

Mr. Muskoff: There is no testimony as to what the property was about.

By Mr. Muskoff:

Q. Is this property down at the corner of Newnan and Bay Street?

A. That's right; service station and store.



Mr. Muskoff: It ties in with the trade testified about yesterday.

Further direct examination.

By Mr. Yerkes:

Q. What is the Block and Lot number on that?

A. Without going into details of what the lots consisted of, Lot 3, Block 2, Jacksonville.

Q. What was the balance due on that mortgage at the end of 1944?

A. \$14,824.46.

Q. I will ask you now, did either Baker Bryan or Evelyn Bryan have an account in the Atlantic National Bank?

A. You said, "either"?

Q. Yes.

[fol. 148] Mr. Muskoff: I would like to clear this up a little.

The Court: Do you want to ask him some questions?

Mr. Muskoff: Yes, your Honor.

The Court: Go ahead.

Further cross examination.

By Mr. Muskoff:

Q. You stated that Mr. Bryan paid \$2100 during the year 1944, or \$175 a month?

A. Yes, sir.

Q. When did he assume that mortgage?

A. Around, according to our records, February 2, 1944.

Q. Then he would not have paid at \$175 a month, \$2100; you gave the complete year's figure when he didn't assume that until the second month when payment was past due.

A. The first payment was made on February 9, 1944.

Q. Who made that payment?

A. It was made by Baker Bryan.

Q. You are sure that was made by Baker Bryan?

A. Yes, sir.

Q. When did he assume it?

A. February 2nd.

[fol. 149] Q. He made payment on when?

A. February 9th.

Q. And he made payments thereafter?

A. Yes, sir.

Q. And so from your figure you would have to deduct \$175?

Mr. Yerkes: I think that is argumentative.

By the Court:

Q. Did he pay only eleven months, or did he pay the whole twelve months, that is the question.

A. He made twelve payments.

Q. He made twelve payments?

A. Yes, sir.

Q. Mr. Bryan made twelve payments?

A. I will give you the dates.

Q. Do you have marked down who made the payments?

A. After Mr. Hoffman advised us on February 2nd, notices were mailed out to Mr. Bryan thereafter.

Q. That was on February 2nd?

A. That's right.

Q. Do your records show anything but that Mr. Hoffman, or whatever his name was that made those payments, up until that time?

A. Our records show that Mr. Hoffman did make payments up to that time. Our records will not indicate who came in and made that February 9th payment, because our credit slips for those dates have been destroyed.

Q. There was a payment due on January 9th, was there not?

[fol. 150] A. The payment made on February 9th was the payment due on January 28th; and the January 28 payment was, if I am not badly mistaken, it was mailed to the Bryan's.

By the Court:

Q. All twelve payments were made after February 2nd?

A. February 2, 1944. (Reads from memo:) "Accounting Department. Re: Hoffman Mortgage. Mr. Hoffman has sold property purchased from Bryan Investment Co. to Evelyn Bryan and J. Baker Bryan, whose address is, care Skyway. Please send him a new notice for the January payment on this loan."

Further direct examination.

By Mr. Yerkes:

Q. Have either Baker Bryan or Evelyn Bryan had an account at the Atlantic National Bank, or did they have in 1944?

A. We had an account in 1944 with J. Baker Bryan.

Q. Have you those records with you?

A. I have. I was not asked to bring these records in my subpoena, but I brought them anyway.

Q. What are these papers you have just handed me?

A. This is the ledger sheet of J. Baker Bryan, checking account.

Q. And what is this (indicating)?

A. That is his signature.

[fol. 151] Mr. Yerkes: We offer the signature card and ledger sheet of J. Baker Bryan in evidence.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence as Government's Exhibit No. 20.

By Mr. Muskoff:

Q. Before that goes in, that statement runs for years other than 1943 and 1944?

A. It runs for the full term of the account.

Mr. Yerkes: I am only interested in 1941 and 1942, 1943 and 1944, and they are admitted only as to that.

The Court: The Jury will disregard any information on those statements with reference to any period outside of those four years.

By Mr. Yerkes:

Q. Have you any other bank accounts?

A. No, that's all.

Q. The person authorized, as shown by this Exhibit, to withdraw from this account, was Baker Bryan?

A. Yes, that is his signature.

[fol. 152] Mr. Yerkes: Your witness.

Further cross examination.

By Mr. Muskoff:

Q. You testified with reference to this property down at Bay and Newnan Street; do you know how much rent was being collected monthly on that property?

A. No, I do not.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

JOHN W. HARRELL was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Harrell, please state your name.

A. John W. Harrell.

Q. You are an attorney here in Jacksonville?

A. I am.

Q. You have been practicing about thirty years?

A. Longer than that.

Q. Mr. Harrell, did you have a transaction wherein you represented Mrs. Ethel L. Coulter in the sale of a piece of property?

[fol. 153] A. I don't believe so.

Q. You were in that transaction wherein Lots 9 to 16 of Oakwood Villas, S. Jacksonville——?

By Mr. Muskoff:

I object to counsel testifying.

The Court: He can ask him if he had something to do with the sale of that property.

Mr. Muskoff: If it is a confidential thing where he is still representing Mr. Bryan, can he still ask it?

A. Yes, I represented some parties who purchased that property.



Q. Who was that party?

A. J. Baker Bryan was one of them. I am not sure I can tell you whether Mrs. Bryan was also a party. (Refers to files.) Baker Bryan and his wife Evelyn Bryan.

Q. From whom was that purchased?

A. Ethel L. Coulter.

Q. What was the description of the property?

A. Lots 9, 10, 11, 12, 13, 14, 15 and 16, Block 35, Oakwood Villas.

Q. Did you close that trade?

A. I did.

Q. Have you your closing statement?

A. Mr. Yerkes, I may have spoken too quickly. I don't have the closing statement and it now occurs to me that this transaction was closed in Mr. Crawford's office, of [fol. 154] Crawford & May, who, I believe, represented Mrs. Coulter; and I believe I only acted in accepting a deed.

The Court: Was that the transaction that Mr. Crawford testified about?

Mr. Yerkes: No, sir.

The Court: This is the one he testified he didn't know anything about?

Mr. Yerkes: Yes, sir.

A. (Continuing). Mr. Yerkes, I believe my only connection with the transaction was to examine a deed and a title policy submitted to me by Crawford & May and that I had nothing to do with closing the transaction other than just to tell Mr. Bryan that in my opinion the title was good.

Q. Did you give the check, or was the check given in your presence, to Mr. Crawford or Mr. May?

A. I don't have any independent recollection of that and my file does not indicate, but I am of the opinion that I did not, that this was handled in Mr. Crawford's office and that I was not present. I know I was not in Mr. Crawford's office. It is my recollection that the papers were either mailed to me or delivered to my office by messenger, and, as I say, I merely told Mr. Bryan that in [fol. 155] my opinion that the papers submitted to me evidenced a good title.

Q. Now, Mr. Harrell, wasn't the Coulter check made payable to you and you drew a check to Baker Bryan

for the amount—or, I mean the other way around—wasn't Bryan's check made to you and you, in turn, made a check to Mrs. Coulter?

A. I have no recollection of it, if such was the case. I have a memorandum in my file that I can use to refresh my recollection.

Q. Go right ahead.

A. I have a memorandum dated February 3, 1944, entitled, "Re: Bryan vs. Coulter. Closed the above mentioned transaction today. Delivered to Mr. Crawford our check for \$10,312.56 payable to the order of Crawford & May, Attorneys for Ethel L. Coulter, in payment of balance due on purchase price of property. He delivered to me Crawford & May checks, one payable to Title Company for—". I didn't know the amount and never filled it in. "—in payment of principal on title insurance, and another to me for \$21.55 to cover documentary stamps. I delivered the checks to the title company in payment of principal on policy and for stamps. The check for stamps should have been" —I got cheated a little on the transaction—"for \$22.05, instead of \$21.55. Mr. Crawford owes me 50¢. Mr. Crawford also delivered me copies of letters addressed to Harold Van Winkle and also to George Fish & Company and copy of closing statement. He also delivered to me fire insurance policy." Now, attached to that is a purported copy of the closing statement.

[fol. 156] Q. On whose behalf did you close this?

A. Baker Bryan and Evelyn Bryan.

Q. This was presented you by Crawford & May (indicating paper)?

A. Yes, sir.

Mr. Yerkes: We offer this in evidence.

Mr. Muskoff: I think it is highly improper for the Government to put a man's lawyer on the stand and I don't believe he can testify under the Rule.

The Court: You let him go through with it without objection.

Mr. Muskoff: I don't want to hide anything from the Jury, but it is not in accordance with any proceeding that I know of.

Cross examination.

By Mr. Muskoff:

Q. You didn't make this closing statement up; did you?

A. No, sir.

Q. This is on Crawford & May's stationery?

A. That's right.

Q. Did you calculate the figures here?

A. I did not.

Q. All you have is a piece of paper furnished by Crawford & May?

A. Yes, sir.

[fol. 157] Further direct examination.

By Mr. Yerkes:

Q. Are the figures in this statement the same as the amount you testified about?

A. I didn't read that before I gave it to you, and, as I say, my recollection is not very good on the matter. (Looks at statement.) Yes, the figures indicated by this statement is the amount I stated in this memorandum I gave my check for.

Mr. Muskoff: Object on the further ground that he has not testified what property this is, when the transaction was closed, when the sale was consummated.

By the Court:

Q. What was the date that the transaction was closed?

A. February 3, 1944.

The Court: And he also testified as to the description of the property. Objection overruled. Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 21".)

By Mr. Yerkes:

Q. How much did Baker Bryan pay?

A. He paid a note of \$10,312.56. I imagine there was some deductions from that and the real purchase price, I should say, exceeded maybe Two or Three Hundred Dollars more than that. I don't have that memo before me.

[fol. 158] Mr. Muskoff: Object to that, he doesn't know.  
The Court: Objection overruled.

Q. Mr. Harrell, did you bring certain records in reference to the transaction in your office with reference to Lot 1, Bowden Farms, Jacksonville, Florida, during the month of March, 1942?

A. I brought all the records in my office that I could find. Mr. Yerkes, could you tell me who the seller was?

Q. Yes, Charles F. Satterwhite and Mrs. Evans, formerly Virginia M. Satterwhite.

A. I have in my file, among other papers, a carbon copy on a blank sheet of paper; that is, it is a carbon of the typewritten part of the deed, deed dated March 20, 1942, from C. Fred Satterwhite and Virginia M. Satterwhite to his wife, Mary Evelyn Bryan; the southeast 250 feet of Lot 1 of Bowden Farms, according to Plat 56 of Book 1 of the Public Records of Duval County.

Q. What date?

A. Deed dated March 20, 1942.

Q. Did you handle that transaction?

A. Yes, I did.

Q. How much money was paid by the purchaser for that property?

Mr. Muskoff: Object on the ground it is not shown that the defendant purchased the property, whatsoever.

[fol. 159] The Court: He testified it was taken in the name of the defendant's wife.

Witness: That's right.

The Court: Objection overruled.

A. A memorandum in my file in my handwriting indicates that the purchase price was \$4,000.00.

Q. But does the memorandum indicate whether that was paid, that is, cash, either by money or check, or paid by partly money and partly mortgage?

A. He assumed a mortgage for \$1500, unpaid and accrued interest on the mortgage amounting to \$52.50; recording fees and documentary stamps and title costs all have been paid by seller; aggregating other amounts on account of said mortgage and miscellaneous items mentioned being a total net allowance of \$1563.70 and indicating a cash payment of \$2436.30.

Q. Mr. Harrell, did you pay the mortgage?



A. Well, let's see if there is anything in my files to show. Mr. Yerkes, I can't say.

Q. Let me see if I can help you refresh your recollection. I will ask you whether or not your records show that on the 19th of March, 1942, that you received a check from Baker Bryan for \$4,000?

A. My record does not show.

[fol. 160] Mr. Yerkes:

Your witness.

Cross examination.

By Mr. Muskoff:

Q. You testified with reference to the property known as Oakwood Villas; did you handle that property for Mr. Bryan again at a later date?

A. I did.

Q. What date?

A. February, 1944.

Q. February, 1944? What happened to it then?

A. Mr. and Mrs. Bryan sold it to Mr. John D. Sheesley.

Q. How much was that?

A. Twelve Thousand Dollars.

Q. Did you have a memorandum to that effect?

A. I do. (Produces paper.)

Q. Was that made by you?

A. Yes, it was.

Q. That was the same property that Mr. Crawford handled on the other side for Mrs. Coulter?

A. That's right.

Q. The same identical lots?

A. That's right.

Q. Is this a closing statement (indicating)?

A. That's right.

Mr. Muskoff: I offer this for identification.

[fol. 161] The Court: Let it be filed for identification.

(Same is marked, "Defendant's Exhibit 'A' for identification.")

Q. What did you say that was?

A. The statement is dated February 7, 1944, but let me see if I have a copy of the deed in my file. Yes, I have a copy of the deed. It is not a full copy.

By the Court:

He wants to know the date.

A. From Baker Bryan and Evelyn Bryan, his wife, to John D. Sheesley and Dorothy May Sheesley, his wife, \$12,000, and the deed dated February 7, 1944.

Q. And that is a copy made in your office at the time the deed was drawn up?

A. That's right.

Mr. Muskoff: Defendant offers that for identification as Defendant's Exhibit "B".

The Court: Let it be received for identification.

Q. He paid how much for it?

A. If you will let me see the exhibit that was introduced by Mr. Yerkes, the Crawford & May exhibit, I can tell you. (Witness is handed exhibit.) The purchase price was \$10,500 to Mrs. Bryan.

[fol. 162] Q. The date they purchased it was when?

A. This is dated February 1, 1944.

Q. It was between February 1 and February 5 and you sold it the same month and the same year?

A. That's right.

Mr. Muskoff: That's all.

Redirect examination.

By Mr. Yerkes:

Q. Mr. Harrell, Government's Exhibit No. 21 shows that in this closing statement, approximately the first of February, 1944, that Baker Bryan bought this property from Mrs. Coulter; is that right?

A. Did he buy it, or did Mrs. Bryan? They both bought it.

Q. Then on February 7 he turned around and sold it?

A. Yes, that was the same month.

Mr. Yerkes: We now offer in evidence the closing statement which has been filed as Defendant's Exhibit "A" for identification.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 22".)

[fol. 163] Mr. Yerkes: We now offer in evidence Defendant's Exhibit for identification, "B", being the skeleton carbon copy of the deed.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 23".)

(Whereupon, the witness was excused.)

WALTER DENSON, JR., was called as witness on behalf of the United States and testified as follows, having been first duly sworn:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Walter Denson, Jr.

Q. What is your business?

A. Plumbing and heating contractor.

Q. Where is your business located?

A. 902 Myrtle Avenue.

Q. Do you know the defendant, Baker Bryan?

A. Yes, Sir.

Q. I ask you whether or not in the year 1944 you did certain work for him?

[fol. 164] A. My company did.

Q. Will you testify where that work was done?

A. I didn't handle it personally; my manager handled it. I think some at the Skyway and some at the Showboat and very little work at the Windmill.

Q. And was some done at the corner of Newnan and Bay Street?

A. Yes, Sir.

Q. Did you bring some notes made from your records to refresh your recollection?

A. My bookkeeper made them.

Q. Will you testify how much during 1944 was paid you by Baker Bryan?

A. I didn't total it up, I just have it here.

Q. Suppose you give the dates and the amounts.

Mr. Muskoff: I would like to admonish the witness to be sure the amounts paid were by J. Baker Bryan, Sr.

A. They were not paid me personally; they were paid by cash to this man that worked for me at the time.

Q. Who paid it?

A. I don't know who paid it.

Mr. Muskoff: Object to that.

The Court: Objection overruled.

[fol. 165] By the Court:

Q. It was in payment of a bill against J. Baker Bryan?

A. Yes, Sir.

Mr. Muskoff: At this time, I would like to show what I am getting at. The Skyway Club during that year for the most part was operated by his son; Mr. Bryan turned it over to his son because of sickness. If his son, who is named J. Baker Bryan, Jr., ordered this work, I don't think it would be competent evidence.

The Court: He testified this was an account against J. Baker Bryan. If it is a fact that it was done for the benefit of the son, I hope we will get that fact before the Jury; but at the outset it is J. Baker Bryan in general and he is merely testifying the amounts of money paid on that account, so let's have it.

Mr. Muskoff: My point is, I don't think the witness can testify unless he knows who the work was done for.

The Court: He is testifying from his own records and as to how the charges were made. If he knows anything beyond the record of his own knowledge he can tell us that. If his papa told him to pay some bill, he can tell us that.

Q. How much money did you get paid on the Baker Bryan account?

[fol. 166] A. January 6, 1944, \$9.25; on the 19th, \$32.70; February 25, \$4.50; March 9, \$6.75; March 5, \$68.30; June 8, \$128.50; July 7, \$336.04; July 19, \$250; September 19, \$113.96; October 5, this is "Showboat", \$81.00; and on November 27, \$287.50.

Q. What was that on?

A. That is not marked.

Q. It was on his general account; is that right?



A. Yes, we just run one account, the Baker Bryan account; we didn't itemize the separate jobs; we did that on our invoices, but not on the books.

Q. Will you repeat those figures? Did you have a payment on June 9, 1944?

A. On June 9th we got a payment of \$200.

Q. How about July 19th?

A. Two Hundred and Fifty Dollars.

Q. How about August 21st?

A. I got September 19, \$113.96, and October 5, \$81.00.

Q. Have you got a separate entry of September 19th for another amount?

A. No, just \$113.96.

Q. How about on November 27, 1944?

A. That was \$287.50; that was paid. I don't have what date that was paid.

Q. Have you the ledger sheet of the company there?

A. This (indicating) is all I have.

Q. Is this the ledger sheet of your company?

A. That is all we have; yes.

Q. Hand you a paper and ask you what this is.

A. I don't know whether it is the ledger sheet or the journal sheet; I don't know one from the other.

[fol. 167] Q. Is that a record of your company?

A. Yes, Sir.

Q. It is kept in the usual course of business?

A. Yes, Sir.

Q. By your bookkeeper?

A. Yes, Sir.

Mr. Yerkes: We offer this in evidence.

Cross-examination.

By Mr. Muskoff:

Q. You don't know who ordered this work done; this is merely your way of setting it down?

A. I didn't do any business at all with Mr. Bryan; my man who was running the business at the time did.

Q. You didn't run the business at the time?

A. I owned the business, but didn't go out and do personal contacts.

Q. You don't know whether this was ordered done by Mr. Bryan or Mr. Bryan's son?

A. No; I did go one time with this man to collect some money from Mr. Bryan.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 24".)

[fol. 168] Further direct examination.

By Mr. Yerkes:

Q. I hand you herewith a paper marked, "Hinged Flat Opening Rag Ledger"; what is that?

A. That is my ledger sheet.

Q. For whose account?

A. Baker Bryan. There are some other accounts too, not pertaining to Mr. Bryan.

Q. And this (indicating) does pertain to Baker Bryan?

A. Yes, Sir.

Mr. Yerkes: We offer these ledger sheets in evidence, insofar as they apply to Baker Bryan.

Further cross-examination.

By Mr. Muskoff:

Q. Are these same entries carried through on those sheets?

A. No, not on those sheets.

By the Court:

Q. Do they represent additional amounts?

A. Yes, Sir.

By Mr. Muskoff:

Q. You don't know whether this work was done for Baker Bryan or who it was done for?

A. You mean, the work for Baker Bryan?

Q. Yes.

[fol. 169] A. I know the work was done for Baker Bryan; that's all I had on my books.

Q. All you know is what you have on your books?

A. Yes, Sir.

Mr. Muskoff: That's all.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 25".)

(Whereupon, the witness was excused.)

MRS. ELLEN TERRY CLARK, was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. You mean, Ellen Terry Clark?

Q. What connection have you with the Clark Realty Co.?

A. I am part owner.

Q. And have you the records with you there?

A. Yes, Sir.

Q. Have you records there showing certain sales during August, 1941, by your company to Baker Bryan?

A. Yes, Sir.

[fol. 170] Q. Please refer to those records and testify to them?

A. Do you want the amount of sale? I had nothing to do with the business at the time this was done, but it is written in my husband's handwriting and I believe it to be correct.

Q. This is a docket of the general records of the company?

A. Of the deeds we made.

Q. And the prices?

A. Yes, Sir.

Q. You are now an officer in the company; are you not?

A. Yes, Sir.

Q. And you have those records in your custody?

A. Yes, Sir.

Q. And they are company records?

A. They are.

Q. Please testify about the transaction in August, giving the exact date.

A. August 12, 1941, J. Baker Bryan, Lot 8, Block 11, in Panama, deeded to J. Baker Bryan, August 12, 1941, and paid by cash, \$400.00.

Q. That was a subdivision known as Panama Park?

A. Yes, Sir.

Q. Have you another record of February, 1944?

A. February 11, 1944, to Evelyn Bryan and J. Baker Bryan in Panama Park, Lot 8, Block 12, \$2,000 paid February 11, 1944 by cash.

Q. Now, the transaction of June, 1944, Mrs. Clark?

A. June 21, 1944, Maurice E. Bryan, parenthesis, J. B. Bryan, Lot 4—.

[fol. 171] Mr. Muskoff: I object to the "parenthesis".

The Court: She is just reading from her records. Objection overruled.

A. (Continuing:)—Lot 4, Block 11, Panama Park, \$500, deeded to Maurice E. Bryan, by cash, \$500.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. And that's all you know about it?

A. Yes, Sir.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

HOMER C. REED, was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Homer C. Reed.

[fol. 172] Q. Where do you live?

A. Cottage Avenue, Hyde Park.

Q. Do you know this defendant sitting here?

A. Yes, Sir.

Q. Were you ever in partnership with him?

A. Yes, Sir.



Q. Just testify about that; when did you form the partnership?

A. Sometime in 1943. I am not very good at remembering dates. It was the "Little Club".

Q. Where was that located?

A. On Main Street, about three miles out.

Q. In reference to what land mark out there would you place it?

A. A half mile past the bridge.

Q. A half mile beyond Trout River Bridge?

A. Yes, Sir.

Q. What was that partnership; just explain that.

A. It was a kind of a bar business, saloon business, small night club.

Q. What was the nature of the partnership; what was the agreement?

A. I bought half of it out from him to start with. We were partners fifty percent.

Q. How much did you pay him for that partnership?

A. Either \$1,000 or \$1100; I can't remember; for a half interest.

Q. Then again did you purchase the rest of the interest out later?

A. Later on. I forget just what date it was. The black-out was around there and there was not enough for two of us and so I bought it out.

[fol. 173] Q. How much did you pay him for the other half?

A. Around \$2500, including some of the stock. There was stock and fixtures; wasn't much stock; mostly fixtures.

By the Court:

Q. In what year was it you bought his remaining half?

A. 1943.

By Mr. Yerkes:

Q. What time was it that you bought the final interest out?

A. In 1943.

Q. Could it have been that trade was on the first of January of 1944?

A. I have a sworn affidavit and that is all I can go by. I have a copy of it here.

Q. Use that to testify when you bought the final half.

Mr. Muskoff: I would like to find out about this affidavit.

Cross-examination.

By Mr. Muskoff:

Q. Who wrote the information down that is on that affidavit?

A. The F. B. I. agent, Mr. Redding.

Q. The Federal Government agent; where did he get that, did he get that information from you or did he furnish it to you?

[fol. 174] A. He came out and found me in my place of business and took me directly to my bookkeeper and went through the books, personally, himself, and looked at every bit of the books and this is what the affidavit is from.

Q. He took that from your books kept by your bookkeeper?

A. Yes, Sir.

By the Court:

Q. Refresh your recollection as to what date you bought the defendant out entirely.

A. January 1, 1944; that's right.

Q. Does it show the exact amount you paid on the first occasion?

A. No; it says: "Bryan decided to get out of the partnership he had with me, at which time he was paid \$1,000 in cash by me as his share of the separation. On January 1, 1944 I further paid Bryan \$2500.00 cash for the furniture and fixtures," and some of that was stock. He didn't write it exactly as I told him.

Q. You fix the first amount as \$1,000, and the second amount as \$2500?

A. Yes, Sir.

Further direct examination.

By Mr. Yerkes:

Q. The first amount in 1943 and the second amount in 1944?

A. That's right.

[fol. 175] Further cross-examination.

By Mr. Muskoff:

Q. When did you make that affidavit?

A. I could not tell you that date to save my life. I believe it is dated here. No, the date is not on here.

Q. Do you think you paid that money on New Year's Day of 1944?

A. I couldn't say.

Q. Do you think that is the date it is entered in your book, as of that date?

A. I don't know. I don't think what I don't know.

Q. You don't have any personal knowledge of it?

A. No, Sir.

Mr. Muskoff: That's all.

Mr. Yerkes: I have here, in fairness to the witness, they asked him when he made that statement to the Special Agent of the Internal Revenue, I think I have something he can refresh his recollection from and in fairness to him I would like to let him have it.

The Court: Let him see it. Is that the original?

Mr. Yerkes: Yes, Sir. (Hands paper to witness.)

Witness: I can't see without my glasses.

[fol. 176] Mr. Muskoff: I would like to have it in evidence.

The Court: Let the Government introduce it then.

(Same is filed and marked, "Government's Exhibit No. 26".)

(Whereupon, Mr. Yerkes reads said exhibit to the jury, as follows:) "Little Club, Route 2, Box 179-A North Main Street Road, Jacksonville, Florida, March 4, 1946. My name is Homer C. Reed, and I am the owner of the Little Club, located at Route 2, Box 179-A, North Main Street, Jacksonville, Florida. I reside on Cottage Ave., Hyde Park, Jacksonville, Florida, and own my own home there. I have lived here in Jacksonville for about 7 years, and have known J. Baker Bryan, Sr., during this period. About August 23, 1943, Bryan decided to get out of the partnership he had with me, at which time he was paid \$1,000 in cash by me as his share of the separation. On January 1, 1944, I further paid Bryan \$2500.00, cash, for the Furniture and Fixtures that he had in the Little Club. These



amounts totaling \$3500.00 are the only amounts of money for which I have paid him for any business transactions between Bryan and myself, and are the only dealings I have ever had with Bryan. These entries were taken directly from my ledgers, and were verified by Robert F. Redding, who represents himself to be a Special Agent, Intelligence Unit, Bureau of Internal Revenue, Jacksonville, Florida. This statement is made freely and voluntarily, without threats, rewards or promises of rewards being made in return for it. This is a true statement, and is sworn to under oath, at 11:50 A. M. this 4th day of March, 1946, at the residence of Mr. C. P. Kinchen, at the corner of Prospect and 1st Ave., in Riverview, Jacksonville, Florida. Mr. Kinchen is my accountant. H. C. Reed. Witness, C. P. Kinchen. Witness, Robert F. Redding, Special Agent."

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WALTER Y. LAING, SR., was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Walter Y. Laing, Sr.

Q. During the year 1943 were you over at the American Legion Post 88?

A. Yes, Sir.

Q. Have you certain records from Post 88?

A. I have a checkbook.

Q. Does that checkbook show certain records or memorandums in reference to a transaction wherein Post 88 sold a showboat?

A. It shows a deposit on the amount of money.

Q. I will ask you whether or not you have personal knowledge as to whether or not Post 88 sold the Showboat to J. Baker Bryan.

A. Yes, Sir.

[fol. 178] Q. What official position did you hold with Post 88 at that time?

A. I was serving on the Executive Committee.



**Q.** The governmental body of the Legion?

**A.** Yes, sir.

**Q.** Turn to your records and from those records testify the dates and amounts that Post 88 received from J. Baker Bryan for the Showboat.

**A.** It don't show the date received, but shows deposit made on March 9, 1943, for \$2625.00 for sale of boat. That's the record they put on the stub of the check.

**Q.** And that is the full amount you got there, that Post 88 got for the boat?

**A.** To the best of my knowledge there was an additional amount of \$200 for some furniture and fixtures in addition to the sale of the boat, but that does not show on this record.

**Q.** You have a statement there and I would like to refresh your recollection on the amount received from the fixtures, if you can refresh your recollection from this statement you made on November 8, 1945 to Mr. Redding, use that to refresh your recollection.

**A.** This statement was made \$2625 for the boat and an approximate amount, which I didn't know at the time and haven't found any records of the exact amount of the fixtures, and he estimated it to be about \$500.

**Mr. Muskoff:** I object to him testifying what the Government agent estimated.

[fol. 179] **The Court:** Objection sustained.

**Cross-examination.**

**By Mr. Muskoff:**

**Q.** Your records show that it was \$2600?

**A.** Twenty-six Hundred and Twenty-five Dollars.

**Re Direct examination.**

**By Mr. Yerkes:**

**Q.** That was for the boat alone?

**A.** Yes, sir.

**Q.** And the fixtures were extra?

**A.** As far as I know it was some extra and I can't tell you the amount.

Q. For fixtures?

A. Yes, sir.

Mr. Yerkes: That's all.

(Whereupon, the witness was excused.)

ROBERT W. BRACK was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Robert W. Brack.

Q. Where do you live?

A. Jacksonville, Florida.

[fol. 186] Q. Do you know the defendant, Baker Bryan?

A. Yes, I do.

Q. I will ask you whether or not you once owned a place known as "Brack's"?

A. Yes, sir.

Q. Where was that located?

A. I owned a place now known as "Brack's", but that was on N. Main Street Road.

Q. Approximately where?

A. Approximately half-way between rout River Bridge and the airport.

Q. Did you sell that property to Baker Bryan, known as Brack's on N. Main Street Road?

A. Not the property; the business.

Q. What did that business consist of?

A. Just the equipment and a small amount of stock.

Q. And, of course, the good will?

A. Yes, and the license was included in the deal.

Q. How much did Mr. Bryan pay you for that?

A. \$1600.00.

By the Court: /

Q. Have you the year and the date?

Q. When was that transaction?

A. In 1943, I believe; March of 1943.

Q. Have you got the date?

A. March 13, 1943.

Q. How was that money paid you?

A. It was paid, the exact amount of \$1600, part check and part cash; but what amount was paid by check I can't recall.

[fol. 181] Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

JAMES M. SHIELDS was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. James M. Shields.

Q. Do you know the defendant, Baker Bryan?

A. Yes, sir.

Q. Did you have a transaction with him in reference to the Windmill Restaurant?

A. That's right.

Q. Testify about that; first of all, what did you do?

A. You have the record and I have a record of it here.

Q. But this Jury has got to get that. Did you sell the Windmill to Mr. Bryan?

A. I sure did.

Q. When?

A. August 10, 1944.

Q. Have you got the lot description there on that property?

[fol. 182] A. No, I haven't got the lot description. I don't own it anymore.

Q. How did he pay you for that?

A. Cash.

Q. What was the first payment?

A. Five Hundred Dollars.

Q. That was a binder?

A. Yes, sir.

Q. Then how much more was paid?

A. \$13,500.00.

By the Court:

Q. Does the \$13,500 include the \$500, or was it \$14,000 all together?

A. \$14,000 all together, yes.

Q. Was there, or not, a mortgage on there?

A. Yes, it sold for the mortgage.

Q. Then that mortgage was paid off?

A. That is all here; you have the record on it.

Q. Yes, but these gentlemen here want to know. Do you know how much that mortgage was?

A. The mortgage was around—I don't know what it was—must be around \$4,000, or something. \$6,500, I believe that's what it was.

Q. Payable to whom?

A. John H. Swisher.

Mr. Yerkes: Your witness.

[fol. 183] Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

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DAVID W. SHAFFER was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. David W. Shaffer.

Q. Do you live in Jacksonville?

A. Yes, sir.

Q. By whom are you employed?

A. Miller Electric Company.

Q. How long have you been so employed?

A. Twelve years.

Q. Did you bring any records with you with reference to the J. Baker Bryan account on the Skyway account?

A. Yes, sir.

Q. Have you that with you?



A. Yes, sir.

Q. You have handed me certain papers; what are those papers?

A. It is a ledger sheet and work order for work we did at the Skyway Club.

Q. Those are official records of your business?

A. Yes, sir.

[fol. 184] Q. Was that done between 1941 and 1944?

A. The work was done in the latter part of 1941; the dates are on the work order.

Mr. Yerkes: We offer it in evidence.

Cross-examination.

By Mr. Muskoff:

Q. Do you know for whom this work was done?

A. It was done at the Skyway Club on order of Robert Milligen, deceased.

Q. It was not done at Mr. Bryan's order; was it?

A. No, sir.

Q. Mr. Bryan didn't pay you for it?

A. The bill was never entirely paid.

Q. But Robert Milligen died in the meantime and didn't pay?

A. He paid some cash on it.

Q. That was not Mr. Bryan?

A. I never have had any dealings with Mr. Bryan.

Mr. Muskoff: We object to that being offered.

The Court: Objection sustained.

Mr. Yerkes: May it please the Court, I had asked the Court to examine these records and it shows it was Baker's night club and—

[fol. 185] Mr. Muskoff: I object to this testimony going before this jury. Let's get to the whole truth of this thing and not the half truth.

The Court: You may file that for identification. This witness has testified that all work was done on the order of a man who was a stranger to this case and we have no evidence of his connection with the defendant. If you can connect it with the defendant and show he was an employee

or a partner, or any of those things, then you might lay a proper predicate for that testimony.

(Same is filed for identification as Government's exhibit No. 27.)

Further direct examination:

By Mr. Yerkes:

Q. Did you know Mr. Milligan?

A. Very well.

Q. By whom was he employed?

A. I think he was retired from the City; he formerly was with the City.

Q. At the Skyway, who was he working for?

A. His connection, I don't know. He called me personally and asked me to meet him up there.

Q. You met him out at the Skyway?

A. Yes, sir.

Q. Was he working out there?

[fol. 186] A. No, he met me at the bar and showed me what he wanted done.

Q. He appeared to be in charge?

A. As far as I know.

Q. Do you know who owned the Skyway at that time?

A. Only hearsay. I have been told that Baker owned it, but didn't know Baker and—

Q. Did Mr. Milligan tell you who owned that business?

A. No, sir.

Mr. Muskoff: Object and move to strike the testimony that he has been told by somebody who owned it.

The Court: File those things for identification and let's move along. This witness can't help you out.

Cross-examination:

By Mr. Muskoff:

Q. Did you ever try to collect this bill from Mr. Bryan?

A. Not to my knowledge.

Q. Why.

Mr. Yerkes: Object; he is asking for an opinion.

By Mr. Muskoff:

Q. Who created this bill, Mr. Bryan or Mr. Milligen?  
[fol. 187] Mr. Yerkes: He has testified fully on that.

A. Mr. Milligen ordered the work done.

Q. And you did it for Mr. Milligen?

A. Yes, sir.

Q. And not for Mr. Bryan?

A. Under Mr. Milligen's supervision; who paid for it, or whose money it was, I don't know.

Redirect examination.

By Mr. Yerkes:

Q. Where is Mr. McQuaig?

A. He was our auditor.

Q. Is he still with you?

A. Yes, sir.

Mr. Yerkes: I would like to issue a subpoena for J. B. McQuaig. This witness can be excused.

Mr. Muskoff: I would like to retain this witness and be able to recall him if I need him after the other witnesses.

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[fol. 188] WILL O. MURRELL was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Murrell, please state your name and occupation.

A. My name is Will O. Murrell and I am an attorney at law.

Q. Do you know the defendant, Baker Bryan?

A. I have known him for some years.

Q. Did you bring certain documents with you?

A. I brought my file on what the subpoena called for, although I don't believe it relates to Mr. Bryan. It is just with reference to an automobile that Mrs. Murrell and myself owned at one time and I brought that file with me.

Q. Just testify about that.

A. About what?

Q. The transaction; who did you sell that Cadillac to?

A. My recollection is that this car was purchased by my wife and I in 1940 or 1941; I believe it was the latter part of 1940 and sometime in either 1942 or 1943 we couldn't get gas and tires for it and we decided to put it on the market and took it to Claude Nolan to be serviced and I complained about it then and the service manager——

By the Court:

Q. He just asked you who you sold it to.

A. I don't know; I sold it through Claude Nolan and got a check signed "Evelyn Bryan," is my recollection.

[fol. 189] Q. For how much money?

A. I think the car was sold around Twenty-six—or maybe Twenty-eight Hundred Dollars.

Q. But you got a check from Evelyn Bryan for the car?

A. That is my recollection.

Q. Did you ever see the car afterwards?

A. I thought I had seen it, but won't say for sure.

Q. Who was driving it?

A. I don't know. I don't think I had ever seen it being driven.

Mr. Yerkes: That's all.

Mr. Muskoff: No questions.

By the Court:

Q. You don't have any information in there with reference to how much they paid for it?

A. No, but the subpoena says \$2200.00.

Mr. Muskoff: I move to strike the testimony with reference to the \$2600.

By the Court:

Q. Do you have any record that will show exactly what you got for your car back in your office?

A. No, I do not have.

[fol. 190] Q. Is there any way you can find out and let us know as soon as we reconvene at two o'clock?

A. I will do my level best.



Q. See if you can tell us just how much the car sold for and be back here at two o'clock.

A. Yes, sir.

The Court: I will hold the motion in reserve until he gets back.

(Whereupon, at 12:35 P. M., a recess was had for luncheon until two o'clock P. M., at which time Court reconvened and the following proceedings were had:)

WILL O. MURRELL was recalled for further direct examination.

By Mr. Yerkes:

Q. Have you made a search for certain papers requested by the Court?

A. Yes, sir.

Q. Have you been able to find it?

A. No; I was only able to see where I cashed the check for \$2200 on 4/11/44.

By the Court:

Q. And that was the check for the car?

A. Yes, sir. That was not all; that was the part that was paid by check. My recollection is that it was something like—I am not able to say—it was certainly not over \$2800 and not under \$2600. That is the best I can get at it.

[fol. 191] By Mr. Yerkes:

Q. There was a check for \$2200 and some paid in cash?

A. The total was \$2200 plus maybe \$400 or maybe \$600 more. It was all handled through the man who run the service department of the Claude Nolan Co.

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

F. O. MILLER, JR., was called as a witness on behalf of the United States and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Miller, please state your name.

A. Frank O. Miller, Jr.

Q. What connection have you with the F. O. Miller Piano Co.?

A. President.

Q. You have been requested to bring certain documents with you?

A. I have.

Q. Have you those with you?

[fol. 192] A. Yes, sir.

Q. Mr. Miller, do you know this defendant, Baker Bryan?

A. Yes, sir.

Q. How long have you known him?

A. Personally, about six years, seven years.

Q. Has the F. O. Miller Piano Co. had transactions with Mr. Bryan?

A. We have.

Q. I hand you three sheets of paper which you handed me a moment ago and ask you what they are.

A. They are records of sales of merchandise to Mr. Bryan.

Q. And what are these (indicating)?

A. Ledger sheets; ledger cards.

Mr. Yerkes: We offer these in evidence.

Mr. Muskoff: No objection to the two of them. One account seems to be with Mrs. Bryan.

The Court: Do you want to object to its introduction on the ground that it was hers?

Mr. Muskoff: I object; it is her account, and not his.

The Court: Objection overruled, and let them all go in.

(Same are marked, "Government's Exhibit No. 28".)

[fol. 193] By Mr. Yerkes:

Q. Mr. Miller, I hand you Government's Exhibit No. 28 which are the three ledger sheets pertaining to the account of J. Baker Bryan and that you handed me a moment ago,

and using those, please testify whether or not during the year 1941 certain merchandise was purchased by Baker Bryan from F. O. Miller Piano Co., the purchase being from your company, of course.

A. In October of 1941.

Q. What date?

A. October 25th, we have a sale of a studio piano to Mr. Bryan, \$245.00.

Q. Where was that delivered?

A. Baker's Night Club on Main Street Road.

Q. What was the name of the club?

A. I have it here, "Baker's Night Club".

Mr. Muskoff: I object; it is not how much he agreed to pay, it is how much he paid during those years.

The Court: I think you are right on that. I think you should develop that.

Q. Was that purchased on the installment plan?

A. It was.

Q. Did he pay for it by the end of 1944?

A. No, not completely. By the end of what?

Q. 1944.

A. Payment was completed; yes.

Q. How much did he pay in 1941?

[fol. 194] A. The sum of \$102.50.

Q. How much during 1942, and go on.

A. In 1942 payment was completed in that year, \$207.50.

Q. Then again during 1942, during the month of September, were certain purchases made by Mr. Bryan?

A. In 1942?

Q. Yes.

A. Yes, there was.

Q. What was that?

A. Grand piano in the amount of \$495.00. That was a cash sale of \$400 and an allowance of \$95 on the old piano. The piano was delivered to Mrs. Bryan at 7830 Laura Street.

By the Court:

Q. Is that the one that is in Mr. Bryan's name?

A. Yes, sir.

Mr. Muskoff: Object to that testimony and move to strike.

Q. Is that the residence of Mrs. Bryan?

A. I understand it was. I was told to deliver it to the residence.

By Mr. Yerkes:

Q. Then, again, in September, 1942, was there another purchase made by Mr. Bryan; or, more specifically, September 4, 1942?

A. There was.

Q. What was that?

[fol. 195] A. That was a midget piano, the purchase price was \$225.00. It was delivered to Baker's Bar & Grill, Miami Road and Hendricks Street, South Jacksonville.

Q. How was that paid?

A. In installments.

Q. How did those installments work out, during what years and what amounts?

A. In 1942 there was paid, \$87.00; in 1943, \$69, which, together with the two credit memorandums for piano accepted in trade, made up the total of the sale.

Q. Then, again, in June, 1944.

A. Yes; that was a sale of a used grand piano at a price of \$595. There was an allowance of \$95 on a used upright piano. This piano was delivered to the Showboat, at the Canal on the Beach road. During 1944 there was paid on that installment contract, \$415.00.

Mr. Yerkes: May it please the Court, we are not interested in the piano that went to Mrs. Baker Bryan and we ask that that be withdrawn.

The Court: I will grant that motion.

Mr. Muskoff: I withdraw my motion.

The Court: Gentlemen of the Jury, you will disregard the testimony of this witness with reference to the one piano that was delivered to the home of the defendant and sold [fol. 196] under a contract in the name of Mrs. Bryan in the amount of \$495.00.

By Mr. Yerkes:

Q. But the three items for \$295 on the 25th of November, 1941; \$225 on September 4, 1942; and \$595 on the 21st of June, 1944, are all charges to Baker Bryan; aren't they?

A. That is correct.



The Court: I am returning those exhibits to the Clerk so he will take out the sales to Mrs. Bryan and not include it among the exhibits.

**Cross-examination.**

By Mr. Muskoff:

Q. This (indicating ledger card) is the same card you have identified?

A. Yes, sir.

Mr. Muskoff: I would like to offer this for identification.

The Court: Let it be filed in evidence for identification as Defendant's Exhibit.

(Same is marked, "Defendant's Exhibit 'C' for Identification".)

[fol. 197] Mr. Muskoff: No further questions.

(Whereupon, the witness was excused.)

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BENNIE FLETCHER, was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

**Direct examination.**

By Mr. Yerkes:

Q. Please state your name.

A. Bennie Fletcher.

Q. What is your occupation?

A. Pipe Supply Business.

Q. What is the name of your company?

A. All-State Pipe Supply Co.

Q. Are you the owner?

A. One of the owners.

Q. Do you know the defendant, Baker Bryan?

A. Yes, sir.

Q. Did you have certain transactions with him?

A. I sold him some materials.

Q. Did you receive a subpoena and directions to bring certain papers?

A. Yes, sir.

Q. Did you bring those papers?

A. Yes, sir.

Q. Let me see those, please. (Witness hands papers to counsel.) You have handed me two papers; what are these?  
[fol. 198] A. Purchases that Mr. Bryan made in 1941.

Q. These records are what?

A. This is from the ledger sheet. One of the ledger sheets.

Q. From the ledger sheet of your business?

A. Yes.

Q. Are these records kept and used in the course of business?

A. That's right.

Q. They represent the account of Baker Bryan?

A. That's right.

Mr. Yerkes: We offer these in evidence.

Cross-examination.

By Mr. Muskoff:

Q. One of these is a copy of the other?

A. What's that?

Q. One of those you made a copy of it?

A. That has been back in 1941; I don't know. One is a duplicate, sir.

Q. One is a duplicate of the other; that's what I mean.

A. Yes, sir.

The Court: Just pull out the original and take the duplicate.

Mr. Muskoff: No objection.

[fol. 199] The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 29".)

Further direct examination.

By Mr. Yerkes:

Q. Mr. Fletcher, I wish you would take this record and testify to the Court and Jury the dates of purchase and dates of payments as shown by that record during the year.

A. You mean each one?

Q. Yes, 1941.

A. Well, January 3, 1941, he purchased \$15; on the 3rd, the same date, \$25; on the 4th, he purchased \$2.20; on the 10th, \$11.87; on the 11th, \$2.37; on February 5, \$6.90; February 21, \$6.25. On July 5, \$5.85; October 11, \$8.73; October 14, \$11.89; October 27, \$4.50; October 28, \$3.00; November 3, \$20.98; November 4, \$2.50; on November 4th again, \$25.06; on November 6, \$2.40; on the 20th, 90¢; on the 20th again, \$2.27; on the 20th again, \$19.43; on December 23, \$22.13; then on May 19th, \$15.00.

By the Court:

Q. That was in the next year?

A. No, the same year.

Q. May 19, 1941?

A. That's right; this is all 1941.

Q. What is the total?

A. The total is \$431.68.

Q. Was the bill all paid in 1941?

A. Yes, it was paid.

[fol. 200] By Mr. Yerkes:

Q. Do you remember in what manner it was paid?

A. I think it was cash. I am not positive, but almost sure it was cash.

Cross-examination.

By Mr. Muskoff:

Q. I see here credits of \$15, \$25, \$25, \$30—.

A. That was just payments he made; he didn't pay it all at one time.

Q. Then after that you got cash payments made, \$25, \$25, \$25. What does that mean?

A. I don't know. That could have been either payment of a check, or payment in cash; I don't recall; but it was a payment of something paid on this bill.

Q. It was not all paid at one time?

A. No, sir.

Q. What does the balance of \$221.68 mean on there on December 31st?

A. That is the balance of that year, I think, and then he gradually paid that out. In other words, it has all been paid.

Q. But you don't know when it has been paid?

A. No, sir.

Q. You don't know whether he paid it in the last year?

A. If he paid it—

Q. There is a balance due of \$211 on account up as far as your records go?

A. Yes, sir.

Q. And he paid the other since then?

A. Yes, sir.

[fol. 201] Q. But you don't know when?

A. No, but I know it has been paid.

Mr. Muskoff: The testimony that the money was all paid in 1941, I move to strike that testimony. The witness told your Honor—

The Court: The witness has testified at one place that the account was all paid during 1941, and your testimony is now that it might not all have been paid in that one year, but in subsequent years.

Witness: I think it was paid up until \$221, and when he paid the balance we don't know; whether it was three months later or five months later, we don't know.

The Court: But you don't know when?

Witness: Yes, but it was within a short time.

Redirect examination.

By Mr. Yerkes:

Q. How much of it do your records show was unpaid in 1941?

A. \$221.68.

Q. Then the balance was paid at a later date, but you are not sure when; is that right?

A. That's right.

[fol. 202] Recross-examination.

By Mr. Muskoff:

Q. Aren't you just a little mistaken in your calculations as to how much was paid?

A. The total was \$431.68.



Q. How much was due in December, 1941?

A. \$221.68.

Q. Deduct that from the total bill and we will see how much was paid in 1941; wasn't it \$210?

A. That's right.

Q. And that \$221 is not correct?

A. \$210 was paid up until December 31st and then a balance of \$221.68.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

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ROBERT C. LECHNER was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. My name is Robert C. Lechner.

Q. Are you the proprietor or one of the proprietors of the Lechner Lumber Co.?

A. I am.

[fol. 203] Q. Do you know this man sitting here; Baker Bryan?

A. Yes, sir.

Q. Did you ever have any transactions with him?

A. I have.

Q. Have you been subpoenaed to bring certain of your records?

A. I have.

Q. Have you them with you?

A. I have.

Q. Let me have those. (Witness hands records to counsel.) I hand you two sheets of paper and ask you what they are.

A. These are my ledger sheets out of my accounts receivable ledger.

Q. Whose account do they show?

A. Baker Bryan's.

Q. Was that ledger kept in the regular course of your business?

A. It was.

By the Court:

Q. What are the years?

A. From 1941 through 1945; inclusive of 1945.

Mr. Yerkes: As to the years 1941, 1942, 1943 and 1944 we offer in evidence these ledger sheets.

Cross-examination.

By Mr. Muskoff:

Q. Over here in this left-hand column, these figures, was that put there in your usual course of business?

[fol. 204] A. No, I merely marked it down, the total amounts he paid, in case you asked.

Q. This is not a true copy of your ledger sheet; this is merely what you filled in for your calculations?

A. I put it down in the last hour.

Mr. Muskoff: We object to that.

The Court: Objection overruled. Let it be received for the years 1941 to 1944, and any information shown for 1945 will be disregarded by the jury and if there is anything improper in the notations made on those ledger sheets if counsel will call it to my attention I will instruct the jury regarding it.

(Same is marked, "Government's Exhibit 30".)

By the Court:

Q. What is the total amount of sales in 1941?

A. The account started in December, 1941 and it was \$401.43 in 1941.

Q. Did he pay any cash in that year?

A. Yes, \$125.00.

Q. Now, for the year 1942.

A. My sub-total for the year 1942 was \$808.59, so you will have to subtract \$201.43.

By the Court:

Q. Well?

A. That would be \$407.16 in 1942.

[fol. 205] Q. How much did he pay you during that year?

A. \$769.38.

Q. Pass to the next year.

A. \$160.01.

Q. How much did he pay you during that year?

A. He paid us \$125.00.

Q. Your fourth year?

A. He made no purchases at all in 1944.

Q. Did he pay you anything during that year?

A. No, sir.

Further direct examination.

Q. Do your records disclose where those purchases went to?

A. Our invoices where we delivered the material would, but on some materials that he may have picked up, it would not.

By the Court:

Q. This record you have here does not show?

A. No, these are my ledger sheets. On the original invoices where we delivered it may say "Main Street Job" or "Miller Street Job", but if a man came by and picked up ten sacks of cement on his truck we would not ask where he was going to take it.

By the Court:

Q. What type materials were they?

A. All building materials.

Q. Will you restate the figures on what was paid you in 1941?

[fol. 206] A. \$125.00.

Q. 1942?

A. \$769.38.

Q. 1943?

A. \$125.00.

Further cross examination.

By Mr. Muskoff:

Q. The first year was \$125.00?

A. In 1941; yes.

Q. And \$125.00 in 1943?

A. Yes, sir.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

LORENZO K. MILLER was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Lorenzo K. Miller.

Q. What is your occupation?

A. Division Credit Manager, Peaslee Gaulbert Corporation.

[fol. 207] Q. Were you requested to bring certain records with you?

A. Yes, sir.

Q. Have you these records?

A. Yes, I have the ledger sheets showing purchases for 1941 through 1944. (Hands records to counsel.)

Q. And also the payments?

A. Yes, sir.

Q. What account is that?

A. It is an account of Baker Bryan's Barbecue Stand, North Main Street Road, Jacksonville Florida.

Q. What are these figures here (indicating)?

A. That is just the total; adding machine tape with the figures on there.

Q. That you had figured this up with?

A. Yes, sir.

Q. What years does this ledger sheet cover?

A. It starts in 1938 and goes through 1944.



Mr. Yerkes: We now offer this ledger sheet in evidence insofar as it applies to the years 1941, 1942, 1943 and 1944.

Mr. Muskoff: No objection.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 31".)

[fol. 208] Mr. Yerkes: Would the Court desire that I just take the payments rather than the charges and payments?

The Court: Take the charges and payments annually; don't itemize it.

Q. I wish you would take this ledger sheet and testify, first—you have some tabulations in your hand?

A. Just adding machine tape with those charges on there, and credits.

By the Court:

Q. We want to know what the amount of sales were and the amount of cash payments for each of the years, 1941, 1942, 1943 and 1944.

A. 1941, the sales and payments, both, were \$314.08; 1942, sales and payments, both, were \$1,411.58; there were no sales or purchases in 1943; 1944, there was \$1,240.83.

Q. Was that paid in that year?

A. Yes, sir.

By Mr. Yerkes:

Q. How was that paid, do you know?

A. These were all cash purchases.

Q. Would they indicate cash purchases, if cash was paid, or check?

A. Some of them are marked, "Check" and some are not marked, "Check". They could have been either way.

Q. In other words, some are marked paid by cash and some by check?

[fol. 209] A. Some are marked paid by check and others were just marked, "C. O. D.". I couldn't say whether it was paid by check or cash.

Q. Some of the merchandise was sent out to him C. O. D.?

A. Yes, sir.

Q. Do your records indicate where they were sent?

A. No, sir.

By the Court:

Q. What was the nature of the merchandise purchased?

A. Judge, your Honor, the only thing I have here is the ledger sheet; it doesn't show the type of merchandise.

By the Court:

Q. What do you sell?

A. All kinds of household equipment, furniture, electric appliances and floor covering.

Q. No building material or food?

A. We sell some building material, but no food.

Cross-examination.

By Mr. Muskoff:

Q. Mr. Miller, I notice on here there is a couple of items marked up for credit; in your tabulations, would you have had those as payments of money—did you have a tabulation of how much was returned for credit?

A. No, sir.

Q. Here's one marked, "Error" and you gave a credit for the error, is that charged up to the payments?

A. That is not in these totals.

[fol. 210] Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

JAMES LEON INGRAHAM was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

214 Direct examination.

By Mr. Yerkes:

Q. Are you the—please state your name.

A. James Leon Ingraham.

Q. Are you the proprietor and owner of the Ingraham Construction Co.?

A. My wife and I own it jointly.

Q. Do you know Baker Bryan?

A. I have seen him; I am not acquainted with him.

Q. Did you bring certain ledger sheets with you?

A. I brought the only sale we have made in 1942.

Q. What is this paper that you have handed me here?

A. That comes out of my Daily Ledger where I keep a record of the sales.

Q. What year is that?

A. January 30, 1942. That is the date the material was sold.

Q. January 30, Baker Bryan, 7830 Laura Street, is that the one you refer to?

A. That's right.

[fol. 211] By the Court:

Q. Does it have something else on there, except the daily ledger?

A. This is the only record we keep.

Q. That doesn't only relate to Baker Bryan?

A. No, sir.

By Mr. Yerkes:

Q. Please state how much your record shows that you sold to Baker Bryan on January 30, 1942.

A. \$151.20.

Q. When was that paid?

A. One payment of \$75 was on April 15, and on April 22 the last payment of \$76.20 was made.

Q. So in April of 1942 he paid that bill?

A. He paid in full; it was a very satisfactory account.

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

ROBERT L. KAHN was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

216 Direct examination.

By Mr. Yerkes:

Q. Mr. Kahn, will you please state your name?

A. Robert L. Kahn.

[fol. 212] Q. By whom are you employed?

A. The Shearman Concrete Pipe Co. I am not with them at this time; I was until 1944.

Q. Were you so employed in 1941 and 1942?

A. Yes, sir.

Q. Have you brought certain records requested by our office?

A. Yes, sir.

Q. Let me see that record, please. (Witness hands record to counsel.) You have handed me a paper; what is this paper?

A. That is a ledger sheet of Shearman Concrete Pipe Co.

Q. Whose account is that?

A. The Baker Bryan account at the Rolling Stone.

Q. Is this record a part of your bookkeeping system?

A. It is.

Q. Is it kept in the usual course of business?

A. Yes, sir.

Q. And you also have there, what?

A. The daily ledger showing the collection for the same account.

Q. And this is kept in the usual course of business?

A. Yes, sir.

Mr. Yerkes: We offer these three as one exhibit.

Cross examination.

By Mr. Muskoff:

Q. These sheets cover a whole world of things, other than the Bryan account?

A. That is a daily ledger.

[fol. 213] Q. Each daily ledger covers a number of items?

A. That's right.



Mr. Muskoff: It is quite confusing, your Honor.

The Court: Let's have the ledger sheet in evidence and see if we need the other.

By the Court:

Q. Now tell us the amount of the purchases and payments handled during 1941, 1942, 1943 and 1944.

A. We had one shipment of \$173.25 on April 4, 1942; collection for that shipment was made on May 7, 1942. One shipment, only.

Q. Now, where was that sent to?

A. It was delivered to the Rolling Stone on Phillips Avenue.

By Mr. Muskoff:

Q. How much was that?

A. \$173.25.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

(Said exhibit is marked, "Government's Exhibit No. 32".)

[fol. 214] EDGAR S. HAMON was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

218 Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Edgar S. Hamon.

Q. What is your business?

A. Store fixture manufacturing company; Hamon Furniture Co.

Q. You are the proprietor of that business?

A. Yes, sir.

Q. Were you requested by subpoena to bring certain records with you?

A. Yes, sir.

Q. Have you those records?

A. Yes, sir. (Witness hands records to counsel.)

Q. What are the papers that you have just handed me?

A. They are bills for merchandise as requested by him, when the Government inspector came to my office.

Q. For materials?

A. Yes, sir.

Q. Just tell the Court and Jury to whom the materials were sold?

A. The amount of the materials?

Q. No; to whom were they sold?

A. I have one here sold to the Showboat.

Q. What year was that?

[fol. 215] A. That was March 29, 1943. And another, December 3, 1943, to the Showboat; March 26, 1943, Skyway Club; December 3, 1944, the Windmill; April 30, 1943, to Baker Bryan and Charlie Stokes, in care of the Showboat.

Q. Who ordered these materials?

A. I can't honestly say who did order all of them. We work on those jobs like that; sometimes a carpenter or foreman will be on the job and he will order something. Other than that one invoice for tables that went to the Showboat, I remember who ordered that.

Q. Who ordered that?

A. Mr. Bryan and Mr. Stokes together. They came to my office and ordered them together.

Q. That was for the Showboat.

A. Yes, Sir.

Mr. Yerkes: We offer these invoices in evidence.

Mr. Muskoff: Object to those with reference to the Showboat, because Mr. Stokes testified in behalf of the Government that he paid for those items; there were a number of those items for the Showboat and he eventually sold out to Mr. Bryan for a certain price. These may be some of the items that he paid for and I think it is too much conjecture. It is not definite enough who paid for them, because Mr. Stokes bought his interest out for a certain sum from Mr. Bryan. He said it was costing him money, and how much he put into it, whether that was part of the stuff he bought, or not, I don't know. It is too indefinite.

[fol. 216] The Court: Insofar as this defendant is concerned, I think your objection is well taken.

Mr. Yerkes: Except for this: Mr. Bryan and Mr. Stokes were partners at the time. I think it is going to be shown

where the items are a permanent asset they are not expendable.

Mr. Muskoff: That is what I would like to talk about, what is expendable and what is not expendable around a night club; probably the most expendable is tables and chairs. There is not a club in town that doesn't have a room full of chairs waiting for someone to repair; they are definitely expendable, just as much as food. Mr. Stokes has testified that he put money into it and doesn't know how much. He said he paid some of the bills and Mr. Bryan paid some of the bills; they were losing money and—

Mr. Yerkes: That was the time the Showboat was bought and put in shape to use.

The Court: I am going to overrule the objection. I will let it go in for whatever it is worth and I will take care of it with the Jury if there is anything wrong with it.

(Same is marked, "Government's Exhibit No. 33".)

[fol. 217] By Mr. Yerkes:

Q. I hand you several bills and I am afraid they are not in order, but if you have a recapitulation testify to the Court and Jury, starting in 1941, or, if it was as early as 1943, testify to the Court and Jury the bulk sum, if you have it, of the work you did in that year and the payments you received.

A. Read that please. (To Court reporter.)

Q. I want you to give us the amount of merchandise contracted for.

A. By whom?

Q. Baker Bryan, or Skyway Club, as your records show there.

By the Court:

Q. We want to know the sales in 1943 and the amount of money you got on account on that; and 1944, as well.

A. During the year 1943 we sold \$767.80 to the Showboat and the Skyway Club combined; and that was paid for.

Q. Was it paid for in cash at the time; was it paid for in that year?

A. Yes, Sir.

Q. Was it paid for as each individual job was done?

A. Those were all paid for in the year 1943.

Q. And any other year?

A. 1944; one bill for \$259.80, December 3, 1944, and I don't have the paid data.

Q. Do you know if it was paid in 1944, or not?

A. No, I don't, but I don't imagine it was; but our terms are usually thirty days to sixty days, and this was dated December 3. It probably was paid in 1945.

[fol. 218] Q. In other words, taking the full thirty days?

A. Normally.

Mr. Yerkes: Your witness.

### Cross-examination.

By Mr. Muskoff:

Q. How much did you say was paid in 1943?

A. \$767.80.

Q. Do you recall whether Mr. Bryan paid all of that money, or whether Mr. Stokes paid some of that money?

A. I don't know; I don't remember who paid for it.

Q. Mr. Bryan has always been a little hard for you to get money out of; has he not?

A. A little bit.

Q. Are you sure you didn't go to Mr. Stokes and collect some of that?

A. There was only one I do remember, and that was the one on the tables.

Q. Did Mr. Stokes pay for that, or Mr. Bryan?

A. I called the Showboat for my money and I talked to Mr. Bryan about it and he said, "I will have to see Mr. Stokes about it"; and I called Mr. Stokes in a day or two and didn't get any response; and somebody called my office and said the money would be left at the Showboat for me; and who left it, I don't know.

[fol. 219] Redirect examination.

By Mr. Yerkes:

Q. You say in the year 1943 the last charge was made on December 3?

A. That was 1944.

Q. When were those charges and payments made, what dates, on the Showboat?

A. March 29th, \$300.



Mr. Yerkes: Mr. Muskoff has raised the question of his partner in there, Mr. Stokes; it is definitely established when that partnership ceased and if payments were made after that time I want to establish that without question as to when they were. I realize both of them were responsible for it.

The Court: Go -head.

A. 1943, April 30, \$347; March 26, Skyway Slub; \$96.45, repair bill.

Q. How about December, on the Showboat?

A. December 3, \$24.35.

Mr. Muskoff: He said he didn't think it was paid in that year.

A. That was 1943, \$24.35.

Mr. Yerkes: That's all.

[fol. 220] Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

LYNWOOD JEFFRIES, was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Jeffries, will you please state your name?

A. Lynwood Jeffries.

Q. What connection have you with the Fernandina Dock & Realty Co.?

A. President.

Q. Are you the custodian of the records of that company?

A. Yes, Sir.

Q. Have you been, for a number of years?

A. Yes, quite a few.

Q. What is that ledger you have with you?

A. Well, I have several books; this book (indicating), I suppose you would call that a Ledger Cash Book.

By the Court:

Q. Is that your book of original entry?

A. Yes, Sir.

Q. What is the other book?

A. This smaller book is a contract book; a record of lots sold on contract.

[fol. 221] Q. Then, Mr. Jeffries, did your company, the Fernandina Dry Dock & Realty Co., ever have any business transactions with this defendant, J. Baker Bryan?

A. The Fernandina Dock & Realty Co.; not the Dry Dock Company.

Q. I mean, the Realty Co.

A. They sold a lot on July 15th to Baker Bryan.

By the Court:

Q. Of what year?

A. 1939.

The Court: We are not interested in that.

Mr. Yerkes: Yes, because the payments come in the later years.

Q. We are only interested in payments made in the years 1941, 1942, 1943 and 1944 on that lot.

A. The little contract book shows payments posted from the large book, the Ledger Cash Book, shows the contract payments were made in 1941.

Q. Of how much?

A. Payment on January 21, 1941, \$45.00; July 9, \$35.00; July, 1942, \$275.00.

By Mr. Yerkes:

Q. And that completed the payments for that lot?

A. That completed the payments and the deed was issued later.

Q. Mr. Jeffries, there has been some paid prior to 1941, but what was the price on that lot originally?

[fol. 222] Mr. Muskoff: Object to that, it is immaterial.

The Court: We are interested in what he paid for it in 1941. Objection sustained.

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

EARL H. THOMPSON was called as a witness on behalf of the United States, and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Thompson, please state your name.

A. Earl Henry Thompson.

Q. What connection have you with the E. H. Thompson Company?

A. President and Treasurer.

Q. Are you in control of the records of that company?

A. Yes, Sir.

Q. Did you bring certain records with you?

A. Yes, Sir.

Q. Could you produce those to me, please? (Witness hands records to counsel.) What are these papers that you have handed me?

[fol. 223] A. Copies of invoices.

Q. These are duplicate originals?

A. Yes, Sir.

Q. Who do they show you were doing business with?

A. It just says, "The Boat of Baker Bryan."

Q. Are all those on the Boat?

A. That's right.

Q. Is that the defendant, Baker Bryan, over there with whom you dealt? (Indicating defendant.)

A. I don't remember but one instance when Baker bought anything himself. There was a colored fellow named "Chisolm" that was supposed to be his head waiter, or whatever he might have been. I think he bought almost all that little stuff himself.

Q. For what years does that cover?

A. 1943 and 1944.

Mr. Yerkes: We offer these in evidence.

Mr. Muskoff: We would like to ask a question.

Cross-examination.

By Mr. Muskoff:

Q. Are you sure that Mr. Bryan ordered that, or Mr. Stokes? Look at this bill for the purpose of refreshing your memory.

A. Now, I don't remember. I know Baker came in there one time.

[fol. 224] Q. Did Charley Stokes come in?

A. I think so.

Q. You think he came in there?

A. What kind of a looking man is Mr. Stokes? I don't remember, to tell you the truth.

Q. You remember Mr. Bryan because you remember his bald head?

A. That's right. Yes, I think there was a man with him one time; they came first on this chair deal, they wanted more chairs than this and I had them at one time but in the meantime I sold them; chairs were so hard to get during this period and I sold most of them; and whoever came back, I don't know. There was a couple of weeks elapsed in the meantime.

Q. When were those chairs paid for?

A. Right over the counter.

Q. Were you there when they were delivered?

A. We delivered them on our own truck.

Q. Were you there when they were paid for?

A. Yes, Sir.

Q. Do you know whether Mr. Bryan was there, or did Mr. Stokes pay for those?

A. I don't know.

Mr. Muskoff: We object, unless it is shown that Mr. Bryan paid for them.

The Court: That is for one item out of all of them?

[fol. 225] Mr. Yerkes: That is the one item; the item of chairs.

The Court: Objection overruled; let it go in.

(Same is marked, "Government's Exhibit No. 34".)

By the Court:

Q. How much is the amount of it?

A. \$535.50.

Q. And it was paid for when?

A. I imagine the same date; they were delivered C. O. D. I think they were paid for before they were delivered.

Q. What is the date?

A. On 3/31/43.



By Mr. Muskoff:

Q. These were all purchased for the Showboat, and paid for?

A. That's right.

Q. That is, six items, and they were paid for on the date, as written.

A. Yes, Sir.

The Court: Let these six items be filed for identification as Defendant's Exhibit.

(Same are marked, "Defendant's Exhibit 'D' for Identification".)

(Whereupon, the witness was excused.)

[fol. 226] J. E. McQUAID was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination:

By Mr. Yerkes:

Q. Please state your name.

A. J. E. McQuaid; Julius E.

Q. What is your occupation?

A. Auditor for the Miller Electric Co.

Q. How long have you been employed by the Miller Electric Co. in that capacity?

A. Eleven or twelve years.

Q. I ask you whether or not your company has ever done any business with Baker Bryan?

A. I haven't had Baker Bryan on the books; I have had the Skyway Club. I don't recall Baker Bryan. I may have.

Q. I have here ledger sheet of Miller Electric Co., under date of October 30, 1941, Baker O'Brien, North Main Street.

A. That is not a ledger sheet; it is a work order.

Q. On November 24, 1941, Baker Nite Club, North Main Street.

A. That's another work order.

Q. I hand you certain papers and ask you what they are; they are marked, "Baker Nite Club", North Main Street.

A. Just which papers are you referring to?

Q. All of them. Those that were left here by Mr. Shaffer, as being records of Miller Electric Co. I wish you would [fol. 227] identify them as to whether or not they are records of Miller Electric Co.

A. They are records of Miller Electric Co.

Q. I wish you would take those records and state to whom the merchandise as shown on there was billed to and by whom paid.

A. They were billed to the Skyway Club.

Q. All of them?

A. As far as I know. This ledger sheet represents all billing.

Q. All billing that is attached there?

A. Yes, Sir.

Q. Where does that billing show that merchandise went and under what name?

The Court: You have lots of bills showing it went to different places and all charged to the Skyway Club; isn't that all you are interested in?

Mr. Yerkes: Yes, Sir.

Mr. Muskoff: A man previous to this time has testified that Mr. Bryan was never billed for this merchandise, but that it was billed to Bob Milligen, who at one time operated a concession there; that is what the testimony is up to this date.

Mr. Yerkes: I can't agree with that.

[fol. 228] A. I only have two billings in my hand.

Q. What are they?

A. They are charged to the Skyway Club; and all these other papers, represents, I imagine, the cost of this particular billing.

The Court: As I recall the other testimony, I don't recall it exactly as you stated. I ruled that the other witness disqualified himself to testify with reference to that account and the records and directed Mr. Yerkes to get somebody that could do it if he wanted to put it in.

Mr. Muskoff: The other witness testified that he went out and saw Mr. Milligen himself and Mr. Bryan was not out there and Mr. Milligen directed this witness what was to be done by him, and I think the record will show that.

Mr. Yerkes: I can clear that up by just a few questions. May I proceed?

The Court: Yes, Sir.

By Mr. Yerkes:

Q. Who were the work orders charged to? Check them and see who they were charged to. Just read them out as you come to them.

A. (Reads:) Skyway Club, Skyway Club, Skyway Club, Baker Nite Club, Baker Nite Club, Baker Nite Club, Baker Nite Club, Baker Nite Club, Baker Nite Club.

[fol. 229] Q. Whereabouts?

A. North Main Street is the only address on here.

Q. And who were those work orders posted to on the ledger, the ledger account?

A. Skyway Club. They represented the cost of the building of the Skyway Club. All these forms is just merely material sent out for the construction of whatever job they had.

Mr. Yerkes: Your witness.

Cross examination.

By Mr. Muskoff:

Q. You say that that was the cost of building, or was that the cost of putting in flood lamps and the lamps for stage shows?

A. I couldn't tell you only what it says; only the building, that's what I have reference to.

Q. Did you know who paid this money that was supposed to have been paid, which shows it has been paid?

A. I beg your pardon?

Q. Do you know who paid this money in, the items shown to have been paid; who actually paid for that?

A. That, I couldn't say.

Q. You can't say that?

A. No, Sir.

Q. If Mr. Shaffer testified that the only payments made were paid by Bob Milligen, would he be wrong or right, in your opinion?

[fol. 230] Mr. Yerkes: I object to that; I don't believe that was the testimony.

The Court: Objection overruled.

A. That I could not say.

Q. Is there a balance due on this bill yet?

A. There was.

Q. Does it show that there was a balance due?

A. It shows it was charged to, I think, "Accounts of Bad Debt".

Q. Do you know why that was charged to "Accounts of Bad Debt"?

A. That is the usual procedure when you can't collect.

Q. If a man dies and dies a pauper, that you actually run this account with, is that the usual procedure?

Mr. Yerkes: There is no basis for that question and we object.

The Court: The controversy in connection with this item is this: When the other witness from this company was on the stand he testified that he was dealing with a third party and the third party died and the remainder of this bill had never been paid, because the dealings had been with the third party and not with this defendant.

By the Court:

Q. Did you ever have any dealings with this defendant?  
[fol. 231] A. Personally, no.

Q. You don't know this defendant any more than the other official of your company that was up here?

A. No, Sir.

The Court: I am going to hold that this witness cannot identify these accounts with the defendant sufficiently to permit them to go in.

(Whereupon, the witness was excused.)

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ANN BOSTIC was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mrs. Bostic, will you please state your name?

A. Ann Bostic.

Q. By whom are you employed?



A. French Mirror Plate Glass.

Q. For how long have you been employed with them?

A. Two months.

Q. Have you the official records of your company with reference to certain transactions that you were requested to bring here?

A. Yes, Sir.

Q. Let me see those records, please? (Witness produces papers) You have handed me certain papers; what are these?

[fol. 232] A. They are records of the transactions made with Baker Bryan in the years from 1941 through 1944.

Q. And that was with the French Mirror Plate Glass Co.?

A. Yes; those are the ledger sheets.

Q. They are kept in the ordinary course of business?

A. Yes, Sir.

Q. What is this yellow one?

A. I just drew that off, so you can get a total.

Q. That is what we might call a recapitulation?

A. Yes, Sir.

Mr. Yerkes: We offer these in evidence. Do you want to object to this ledger sheet?

Mr. Muskoff: On page marked "1944 there is a balance shown due in 1945. I think inadvertently counsel has brought up here 1945 items.

Mr. Yerkes: I am not interested in that.

Mr. Muskoff: Each page is totalled separately. There is an item shown here that is paid, charged out in 1944 and not paid until 1945.

Mr. Yerkes: All I am going to bring out is what was paid in the four years.

[fol. 233] By Mr. Muskoff:

Q. What do you mean by payment of a credit memorandum or C/M?

A. That means he got cred-it for that material. He didn't accept it for some reason, so we allowed him that much credit.

Mr. Muskoff: No objections.

The Court: Let it be received in evidence.

(Same is marked, "Government's Exhibit No. 35".)

By Mr. Yerkes:

Q. Mrs. Bostic, if you wish, I will give you the original back, but this is all shown on this yellow sheet, is it?

A. All except the cash sales; the cash sales are in this book (indicating).

Q. First, on these credit sales, will you testify to the Court the first year those sales show?

A. 1941.

Q. Testify to the amount of purchase in 1941; you can give that in bulk for 1941.

Mr. Muskoff: I don't see why the purchases made in 1941 are material; seems to me we are just losing time. How about the payments made in 1941? I think that is all the Court is interested in.

[fol. 234] The Court: It depends all together on the book-keeping as to just whether or not it is. Not knowing how they are going to account for it I will have to get both items.

A. I don't have them totalled by the year.

Q. Either the sales, or the amount of payments?

A. He had four different accounts with us; three different accounts; and I just have them totalled by the accounts for all four years.

By the Court:

Q. We want to know the amount of purchases in each of the calendar years in 1941, 1942, 1943 and 1944 and the amount of money paid during each one of those years.

A. For 1941 there was just one cash sale for \$9.40; 1942, \$81.30 sales, and \$9.00 cash paid; \$72.30 balance was paid January, 1943. For 1943, \$513.94, that was sales. It was paid in 1944 and 1945. \$20.24 was paid cash. The balance was paid in 1944 and 1945.

Q. How much was paid in 1944?

A. \$443.23. 1944, \$98.35, sales and paid.

Q. That was a cash sale?

A. No, it was not a cash sale, but it was paid in 1945.

Q. And there was a balance remaining due that went into 1945?

A. That's right.

Q. How much of \$98 was paid in 1944?

A. All of it.

Q. Was it all paid in 1944?

A. That's what it says.

[fol. 235] Q. Now, get into the next and tell us about the cash sales for each of the years.

A. 1941, \$9.40.

Q. That was a cash sale?

A. Yes, Sir.

Mr. Muskoff: She has already testified to the cash sale of 1941; is that the same one?

Witness: Yes, Sir.

By Mr. Yerkes:

Q. Were there any cash sales in 1942?

A. \$9.00.

Mr. Muskoff: You have already testified with reference to that.

By the Court:

Q. Wasn't the amount of \$9.00 included in the amount of cash you testified in 1942?

A. I have already said \$9.00.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. How much is the total payment made in 1941, 1942, 1943 and 1944?

A. Total of all of it, \$1,186.71.

[fol. 236] Q. In your totals, is the credit memorandums figured in there too?

A. Yes, Sir.

Q. What you testified to does not necessarily mean sales, because they took something out and brought it back and you credited that as a cash payment for the year?

A. That's right.

Q. So what your figure is in money, checks and merchandise returned, is what you show as cash?

A. That's right.

Q. And you don't have the total figure on the amount of money paid each year, actual money paid into the company?

A. No, Sir.

Mr. Muskoff: That's all.

Redirect examination.

By Mr. Yerkes:

Q. Please give us the payments, subtracting therefrom the merchandise credits. I think that is what your Honor wants?

The Court: That's right.

(Whereupon, the witness having consumed some several minutes and not arriving at an answer to counsel's question, the Court made the following statement:)

[fol. 237] The Court: You have the Exhibit in there and it shows it. You don't have to worry her with that. Let's not let her take any more of our time over this. You can take the time and find out for yourself if you are anxious to know.

Mr. Muskoff: Move to strike the exhibits.

The Court: Motion denied.

(Whereupon, the witness was excused.)

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JAS. D. HOLMES was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Holmes, please state your name.

A. James D. Holmes.

Q. Are you employed by Foley Lumber Co.?

A. Yes, Sir.

Q. In what capacity?

A. Bookkeeper.



**Q.** I ask you whether or not you brought certain records of the Foley Lumber Co. showing transactions with J. Baker Bryan, or Baker Bryan?

**A.** Yes, I have.

[fol. 238] **Q.** Let me see those. (Witness hands records to counsel.) Mr. Holmes, as such bookkeeper, are you in custody of certain records of the Foley Lumber Co.?

**A.** Yes, Sir.

**Q.** I will ask you what these records you have handed me, are?

**A.** Those are sales tickets.

**Q.** Showing sales to whom?

**A.** To the name shown on there, Baker Bryan.

**Q.** And they are duplicate originals of the sales tickets originally entered; is that right?

**A.** Yes, Sir.

**Q.** One is sent out as a delivery slip and one is left with the customer and this is left with the company?

**A.** Yes, Sir.

**Mr. Yerkes:** We offer in evidence the sales slips just testified about.

### Cross-examination.

By Mr. Muskoff:

**Q.** Did you make this sale?

**A.** No, Sir.

**Q.** Do you know who called and got this merchandise?

**A.** I do not know.

**Q.** Where was this merchandise delivered?

**A.** It was picked up at our warehouse.

**Q.** By whom?

**A.** I didn't make the sale.

[fol. 239] **Q.** How do you know that the Bryan is this particular Bryan, when there are a thousand other people in town and the world named "Bryan"?

**A.** (No reply.)

**Q.** Can you positively swear that Mr. Bryan bought that merchandise?

**A.** I can't, no; not that particular one.

**The Court:** We are not getting into the record which one you are talking about.

Mr. Muskoff: This is the one I am talking about (indicating invoice). Therefore, I object to that because the man can't swear to that one.

The Court: Objection overruled. It shows on its face it was sold to Baker Bryan.

Mr. Muskoff: No, it was "Mr. Bryan".

The Court: Lay that one aside, then, for Mr. Bryan.

By Mr. Muskoff:

Q. You have yellow slips here and this is a white one; what is this?

A. Those are copies of the original sales ticket.

[fol. 240] Q. Now, during part of the time you kept white ones and part of the time you kept yellow ones?

A. No; this copy happened to be a white one instead of a yellow one.

Q. Do you think that was put on there with carbon paper, as a copy, or is that an original? (Indicating white copy.)

A. I don't know. It could be a carbon copy of the original; I can't tell by looking at it.

Q. You think in your opinion that could be a carbon copy?

A. It could be; yes.

Q. Doesn't this show an obvious erasure?

A. Yes, it does.

Q. Is that the way carbon erases?

A. No, that doesn't look like a carbon erasure.

Q. That was an erasure in your warehouse?

A. Yes, Sir.

Q. Then your testimony is that part of these are originals and part are carbons?

Mr. Yerkes: I think I put them in as a duplicate original and that is what they all are.

Mr. Muskoff: No objection, except to the one to "Mr. Bryan".

The Court: In reference to that one, does this show where the merchandise was delivered?

[fol. 241] Mr. Muskoff: It shows the warehouse.

The Court: Does it show where it was delivered?

Mr. Muskoff: Just "warehouse" is all it says.

The Court: Let the others go in and let that one be filed for identification. If Mr. Yerkes can tie that up later we will let it go in.

(Same are marked, "Government's Exhibit No. 36" and "Government's Exhibit No. 37 for Identification".)

Further Direct examination.

By Mr. Yerkes:

Q. Mr. Holmes, I guess you are going to have to take a little time and straighten these out; they are all messed up. Will you straighten those out again where you can testify from them and state how much merchandise was purchased in 1941?

The Court: Do we need in this case this dividing it into several years by the witness?

Mr. Yerkes; Not necessarily.

[fol. 242] The Court: Let's discontinue that now. The only thing I am concerned about is whether it includes items for the years 1941, 1942, 1943 and 1944. These witnesses are not coming up here prepared to give the items by years and we are taking too much time. The revenue men can do it.

By Mr. Yerkes:

Q. Were all those bills paid?

A. Yes, Sir.

Q. What years were they paid in?

A. 1944.

Mr. Yerkes: To lay a basis, I realize the Court's ruling, but there is one more that we may or may not tie in; I am having to do that separately; Can I go into that one too?

The Court: Do you mean the one you filed for identification?

Mr. Yerkes: Yes.

The Court: Go ahead.

Q. There is one bill here, 7/11/44, for the sum of \$48.08, to Mr. Bryan; was that bill paid?

A. Yes, it was.

[fol. 243] Further Cross-examination.

By Mr. Muskoff:

Q. Mr. Holmes, it is not unusual for people to come by and buy a small amount of lumber and pay for it; is there?

A. Oh, no.

Q. How many paid bills do you have where people come up and buy something and pay for it, in the course of a year?

A. I don't know; quite a few.

Q. How do you happen to pick that out as being one of Mr. Bryan's?

A. It was along about the same date and the name, and when they picked it out—

Q. Who picked it out?

A. I did.

Q. At whose request?

A. I received a summons to produce certain documents in this court.

Q. And you just happened to bring that along?

A. Yes, Sir.

Q. Had you ever shown that bill to anyone else prior to that time, other than your usual people?

A. No, Sir.

Q. The Government agents had never been out there and checked those bills?

A. They did come out, I understand. I don't know exactly when it was. I understand they were out there. I didn't see them, myself.

Q. But the paid bills are not unusual out there?

A. No, we have many of them.

[fol. 244] Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

J. D. IVEY was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. State your name.

A. J. D. Ivey.

Q. Where do you live?

A. Jacksonville, Florida.

Q. What is your occupation?

A. I am not doing anything at present.

Q. What was your occupation during the year 1944?

A. Building contractor.



Q. Were you operating on your own?

A. Yes, Sir.

Q. Did this man over here, (indicating defendant) did you ever do any work for him in 1944?

A. Some.

Q. What was the nature of that work?

A. Some repair work on some buildings on Bay Street.

Q. What number on Bay Street, if you know?

A. I don't remember; Newnan & Bay; right around the corner of Newnan and Bay.

Q. How much was that job?

A. I don't know. All my records got burned up in a fire on the 20th of March.

[fol. 245] Q. If I show you a statement you made on November 13, 1945, and just give you that to refresh your recollection, you took that from the books at the time; did you not?

A. One of the investigators had taken it from the books and I signed it.

By the Court:

Q. Did you check it and do you know that that was a correct statement?

A. To the best of my knowledge. I signed it; it must be right.

Q. Use that paper to refresh your recollection.

Mr. Muskoff: I would like to inquire into that before we go any further.

Cross-examination.

By Mr. Muskoff:

Q. After the investigator put those figures down, did you, yourself, check those figures against your books; or did you take his word for it?

A. My wife was my bookkeeper at that time.

Q. You never checked those figures against your books?

A. No, Sir.

By the Court:

Q. Did she do it?

A. Not as I know of.

[fol. 246] Q. You don't know whether she did or not?

A. No, Sir.

Q. Would you have signed that if you had not known those figures to be right?

A. The total figures are right. I didn't read all that stuff.

Further direct examination.

By Mr. Yerkes:

Q. In December, 1944, was that; or when was that done?

A. It was signed in November of 1945.

Q. I know, that was the date you made the statement to the agent. When did you do the work?

A. I don't remember what date it was.

Q. What year was it in?

A. 1944.

Q. What was the total of it?

A. According to these figures here, it was, \$3,833.37.

By the Court:

Q. Were you paid for it?

A. Yes, Sir.

Q. In 1944?

A. Not all of it; it taken about eight months to get it out of him, \$100 at a time.

By Mr. Yerkes:

Q. Can you tell how much of it was paid to you in 1944?

A. No. If I had my books, I could.

[fol. 247] Q. But your books burned up?

A. Yes, Sir.

Q. What is your best recollection of it?

A. I wouldn't say.

Mr. Muskoff: I object to the question; he can't guess if he doesn't know.

The Court: He can't guess.

A. I would not want to say.

Mr. Muskoff: I move to strike the testimony with reference to the figure he gave as to the amount of work he completed if payments were made within 1944.

The Court: There is no testimony with reference to the payments. There is nothing to strike on that, Mr. Muskoff.

Q. I would like you again to look at this record and see whether or not at that time your wife didn't prepare, or you prepare, or someone did, the amount of payments made in 1944. Up in the top half of that statement.

By the Court:

Q. Do you recognize that memorandum that Mr. Yerkes just handed you?

A. In 1944 he only paid me—

[fol. 248] Mr. Muskoff: Before he testifies, I would like to find out.

Q. Do you recognize that memorandum?

A. Yes, Sir.

Q. Who prepared it?

A. This memorandum was prepared by the investigators.

Q. Not by yourself, or your wife, or one of your employees?

A. No, Sir.

By Mr. Yerkes:

Q. Did you read over that statement at the time that he prepared it?

A. Yes, I read it.

Q. Was it correct at that time?

A. As far as I would know, yes.

Q. You checked it at that time?

A. I didn't check it back against the books; only thing I looked at was the figures.

Q. Were the figures correct?

A. The totals were.

Q. How about the total figures of the payments?

A. I didn't check the total figures of the payments. The only thing I checked was the total figures.

The Court: Let's leave it alone.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

[fol. 249] R. S. F. HARMAN was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Harman, will you please state your name?

A. Ronald S. F. Harman.

Q. What is your business?

A. As to the information I have here, at the time of that sale?

Q. Yes.

A. I was accountant and cashier for the Kaborn Motor Sales. I am Secretary of Duval Motor Co. Kaborn has no connection with the Duval Motor Company.

Q. You kept the books, and what else?

A. I was cashier and kept the records.

Q. Have you with you certain records of the Kaborn Company?

A. I have. (Witness produces records.)

Q. You have handed me certain papers and I will ask you what they are.

A. I don't know whether you want all of them, or not. This first, is a deposit slip showing the deposit of the transaction. This next envelope is the information where I traded him on the sale of a truck. This next, is a copy of the original invoice, carbon copy, showing sale to J. B. Bryan of the truck.

By the Court:

Q. Did you sell J. Baker Bryan a truck?

A. Yes. I didn't; the business did.

[fol. 250] Q. How much was the sales price?

A. \$1145 was the total price.

Q. And you got a trade-in, and how much was the allowance?

A. \$450, and cash was \$695.00.

Q. How was it paid?

A. I can't be certain, although from the deposit slip it would indicate that there was \$104 in cash and a check for \$591.00.



**Cross-examination.**

By Mr. Cockrell:

Q. What was the date?

A. The date was October 20, 1944.

(Whereupon, the witness was excused.)

M. B. BISHOP was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

**Direct examination.**

By Mr. Yerkes:

Q. What is your name?

A. M. B. Bishop.

Q. By whom employed?

A. Fletcher Motor Sales, Inc.

Q. For how long have you been so employed?

A. About a year and a half.

[fol. 251] Q. Were you requested to bring certain documents pertaining to transactions with the defendant, J. Baker Bryan?

A. Yes, Sir.

Q. Have you those?

A. Yes, Sir.

By the Court:

Q. Does this pertain to the sale of an automobile?

A. Yes, Sir.

Q. This company has sold an automobile to the defendant?

A. Yes, two.

Q. What was the date?

A. April 26, 1944.

The Court: Now, go on, Mr. Yerkes.

By Mr. Yerkes:

Q. Just tell us how much he paid for that car, whether it was a trade-in, or not; and how much cash and so forth was paid.

A. It was a 1941 Four-door Packard Sedan, sold for \$2400, and traded in a 1941 Cadillac Sedan for \$2,000, and paid \$400 difference. On July 21, 1944, we sold him a Cadillac Sedan for \$1913; traded in a 1941 Four-door Packard Sedan for \$863.00 and he paid \$1,050 difference.

Q. Now, get down to the totals on that. How much cash was paid during 1944; were both of those in 1944?

A. Yes, Sir.

[fol. 252] Q. How much cash in 1944 did he pay your company?

A. \$400 in April and \$1050 in July.

Q. And he traded in two old cars?

A. Yes, sir; traded in two automobiles.

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

MRS. BESS C. RUSSELL was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Will you please state your name?

A. Mrs. Bess C. Russell.

Q. By whom are you employed?

A. Riverside Chevrolet Co.

Q. For how long have you been so employed?

A. Eight years.

Q. Were you requested to bring certain records of transactions between the Riverside Chevrolet Company and J. Baker Bryan, or Baker Bryan?

A. Evelyn Bryan.

Q. Have you those records with you?

A. I have.

[fol. 253] Q. When was that transaction?

A. April 19, 1944.

Q. What was the transaction?

A. It was the sale of a 1942 used Ford station wagon.

Q. What was the price?

- A. The sales price was \$1300.  
Q. Was there any trade-in?  
A. 1941 Ford two-door trade-in.  
Q. How much was allowed on that?  
A. \$400.00.  
Q. Leaving what, then, to be paid?  
A. \$900.00.  
Q. Do your records show how that \$900 was paid?  
A. This record does not. I probably have the receipt.  
Q. When was it paid?  
A. The day of the delivery of the car.

Cross-examination.

By Mr. Muskoff:

- Q. Evelyn Bryan, where did she reside?  
A. I don't have the number, but it was on Main Street.  
Q. She resided on Main Street?  
A. That's the number given on the invoice.  
Q. What number?  
A. It does not give the number.  
Q. Were you there when this transaction was handled?  
A. Yes, Sir.  
Q. You saw Mrs. Bryan?  
A. I probably didn't see her. I was in the office and it probably was handled by a salesman.  
[fol. 254] Q. Are you sure the person you sold that car to was J. Baker Bryan's wife?  
A. I wouldn't know.  
Q. You are not positive?  
A. I wouldn't know without looking; it probably could be found on the original order, but it does not show on the invoice.  
Q. That was in 1944?  
A. April 19, 1944.  
Q. But you can't testify that that car was sold to Mr. Bryan's wife?  
A. No, I can't testify to that.  
Mr. Muskoff: I move to strike the testimony.

## Redirect examination.

By Mr. Yerkes:

Q. But it was sold to Evelyn Bryan?

The Court: I will take your motion under advisement.

Mr. Yerkes: I will be prepared to go further with that and would like for you to hold that under advisement.

Q. How much was the check?

A. \$1900.00.

Q. What date?

A. April 19, 1944.

[fol. 255] The Court: I am holding the motion under advisement.

(Whereupon, the witness was excused.)

C. B. MEHAFFEY, was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

## Direct examination.

By Mr. Yerkes:

Q. State your name.

A. Conrad B. Mehaffey.

Q. Mr. Mehaffey, what is your employment?

A. I am with General Motors Acceptance Corporation.

Q. For how long have you been with them?

A. Fifteen years.

Q. Were you requested to bring certain documents with you here today?

A. Yes, Sir.

Q. Have you those?

A. Yes, Sir. (Hands counsel record.)

Q. What is this record?

A. Bills Receivable card.

Q. What does this show?

A. It shows the amount financed by the General Motors Acceptance Corporation and description of collateral; it gives a record of the conditional sales contract.



Q. I wish you would refer to that record and show who was the owner of the card that you had the collateral on. [fol. 256] A. On March 11, 1940 we bought a time sale contract on a 1940 LaSalle Sedan and a contract was signed by J. B. Bryan.

Q. When did you take over that contract?

A. The contract was dated March 8, 1940 and purchased by us on March 11, 1940.

Q. Please testify how much was paid in the years 1941, 1942, 1943 and 1944 on that contract.

A. In 1945, \$547.61 was paid—

The Court: We are not interested in that.

A. In 1940, \$547.61.

Q. In 1941 how much was paid?

A. It would have been \$710.59.

Q. How much in 1942?

A. None in 1942. It was all paid in 1941.

The Court: The Jury will disregard the testimony of the witness with reference to the amount paid in 1940.

Mr. Muskoff: I would like to see the card from which he is testifying.

The Court: Let him see it.

Q. Have you another card there?

A. Yes, this on the contract covering the sale of a 1941 Oldsmobile sedan to J. B. and Mrs. Evelyn Bryan.

[fol. 257] Q. Will you testify how much was paid in 1941, 1942, 1943 and 1944? We are not interested in anything except those four years.

A. In 1941, \$559.92 was paid. In 1942, \$559.92 was paid.

Q. Did that pay it out?

A. That paid it out.

Mr. Muskoff: His son, who is a grown man, bought cars and his name is J. Baker Bryan too. I would like to find out if these were bought by him, or his son.

The Court: He will have an opportunity to tell us.

Mr. Muskoff: I don't want to let the testimony in if he didn't buy them.

The Court: Go ahead with your next one.

A. I have a conditional contract covering the sale of a 1941 Cadillac used sedan to Mrs. Evelyn Bryan and J. Baker

Bryan; the contract was made in August of 1942 and the amount paid in 1942 was \$396.76.

Q. And that paid it out?

A. No, Sir.

Q. The next year.

A. In 1943, \$595.14 was paid, which paid it out.

Q. Is there another contract?

A. No, not for the years you requested.

[fol. 258] Q. Are there any contracts prior to that time, where there were payments in 1941, 1942, 1943 and 1944?

A. No, Sir.

Q. You are not sure whether this is the man over here that bought that car?

A. No, I am not sure that that is the man that bought that car.

Q. Now, going back to these contracts you testified from, Contract 55070.

A. Yes, Sir.

Q. What card was that?

A. That covered the purchase of a new 1938 LaSalle, fourdoor touring sedan, on July 31, 1938.

Q. Whose name was that in?

A. J. B. Bryan.

Q. Now, 67258, your contract number.

A. That is a contract dated June 17, 1939, covering purchase of a new one-and-a-half-ton Chevrolet chassis and kept in the name of J. B. Bryan.

Mr. Muskoff: Is this with reference to payments made in 1941 and 1942?

The Court: He is only testifying with reference to payments made in those years with reference to these contracts.

Cross-examination.

By Mr. Muskoff:

Q. Were there any payments made in 1941 and 1942 on that?

A. No, Sir.

[fol. 259] Mr. Muskoff: I object to the testimony then.

By The Court:

Q. The one you referred to last, no payments were made in 1941 and 1942?

A. No, Sir.

Further direct examination.

By Mr. Yerkes:

Q. No. 55070, was there payments made on that in 1941 and 1942?

A. No, Sir.

The Court: Strike this out. You took the papers from Mr. Muskoff that you testified about, did you mix those up, or did you hand him the wrong ones?

Witness: No, I handed him the right ones.

Q. I have a record of three accounts where payments were made in those years, 1941, 1942, 1943 and 1944; account No. 90538 on the Oldsmobile sedan, 1941 model; Account No. 11233 on a 1941 Cadillac, and No. 79153 on a 1940 LaSalle.

A. Yes.

Q. And those are the ones you testified in reference to those dates as being within the period?

A. Yes, Sir.

[fol. 260] Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

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KINGSLEY McCALLUM, was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Kingsley McCallum.

Q. What is your business?

A. Automobile dealer.

Q. Were you such in 1941?

A. 1941?

Q. Yes.

A. Yes, Sir.

Q. Do you know this man, Baker Bryan?

A. Yes, Sir.

Q. Did you sell him an automobile, a 1941 Cadillac?

A. I sold him a Cadillac automobile; yes.

Q. When was that?

A. 1944.

Q. Have you any records with you?

A. No, Sir.

Q. Where are those records?

[fol. 261] A. I sold him that car when I left Fletcher. I was an individual. I bought the car.

Q. Tell the Court and Jury how much you sold that Cadillac for in 1944?

A. I traded a Cadillac, 1941 from him and sold him, while I was with Fletcher; and there was \$1100 difference for the other car.

Q. How was that paid to you?

A. By Check.

Mr. Yerkes: Your witness.

Mr. Muskoff: No questions.

(Whereupon, the witness was excused.)

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IKE WITTEN, was called as a witness on behalf of the United States and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Please state your name.

A. Ike Witten.

Q. Where do you live?

A. 2004 River Road, Jacksonville, Florida.

Q. What is your business?

A. Merchant.

Q. Did you ever make a loan to a man by the name of J. Baker Bryan?



[fol. 262] A. I made a loan to Evelyn E. Bryan and J. Baker Bryan.

Q. Just testify to that.

A. I made a loan against a piece of property in Jacksonville Beach in 1940 for \$4,000.

Q. What is the description of that property?

A. You mean according to the—?

Q. The plat description.

A. Lots 10, 11 and 12 of Flagler Park according to the plat recorded in Plat Book 15, page 50 of the Public Records of Duval County, Florida.

Q. That loan was for \$4,000?

A. That's right.

Q. When was that made?

A. August 23, 1940.

Q. Was that loan paid?

A. Yes, Sir.

Q. When was it paid?

A. Three years after date.

Q. Was that a regular three-year mortgage?

A. That's right.

Q. In what manner was it paid?

A. My attorney handled it and I understand it was paid by cashier's check.

Q. And, of course, the check was for how much?

A. \$4,000.00.

Q. Did you know of your own knowledge who brought the check to your attorney?

A. No, I didn't see who brought it.

Q. Who was your attorney?

A. Edgar Felson.

[fol. 263] By The Court:

Q. You don't know that this defendant still owned the property at the time the satisfaction was given of the mortgage?

A. I don't know whether he did or not.

Q. And you have no idea whether or not he paid that \$4,000?

A. I don't know. I gave him and Mrs. Bryan the satisfaction, but don't know whether he owned it, or not.

**Cross-examination.**

By Mr. Muskoff:

Q. On what date was the satisfaction?

A. I don't have the date, but it probably was when the money was paid three years after the date of August 23, 1940.

**Redirect examination.**

By Mr. Yerkes:

Q. It probably would be 1943?

A. Yes, whether it was on the 23rd of August, I don't know.

Mr. Muskoff: No further questions.

(Whereupon, the witness was excused.)

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[fol. 264] EDGAR FELSON, was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

**Direct examination.**

By Mr. Yerkes:

Q. Mr. Felson, please state your name.

A. Edgar M. Felson.

Q. What is your occupation?

A. Attorney at law.

Q. You have been practicing law about as long as I have.

A. Almost.

Q. You represent Ike Witten; do you?

A. Yes, Sir.

Q. Do you remember an occasion when a mortgage which had been given by J. Baker Bryan and his wife Evelyn Bryan, which mortgage was dated August 23, 1940; did you handle that transaction?

A. Yes, Sir.

Q. Testify to the Court and Jury—. Mr. Witten has testified that a cashier's check was delivered to you, which you, in turn, delivered to him in payment for the satisfaction of that mortgage.

A. That's right.

Q. Who gave you that check?

A. I don't remember whether Mr. Blume gave it to me, or Mr. Bryan. Robert Blume handled the deal, he was the real estate man. I think the property originally belonged to Mrs. Bryan.

Q. In other words, who was Mr. Blume representing?

A. Baker-Bryan.

[fol. 265] Q. In other words, either Mr. Blume, who was representing Mr. Bryan, or Mr. Bryan, himself, gave you that check?

A. Yes, Sir.

Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. There was a three-way sale and Mr. Bryan was buying this property and selling this property and paying the mortgage off?

A. I don't know. I was representing Mr. Witten, the holder of the mortgage.

Q. You don't know whether they were selling that property and buying some others and Mr. Blume was handling a three-way trade?

A. No, I don't.

Mr. Muskoff: That's all.

(Whereupon, the witness was excused.)

(Whereupon, a recess was had until the following day, Thursday, July 8, 1948, at 10 o'clock in the forenoon, at which time Court reconvened and the following proceedings were had:)

[fol. 266] E. J. MARQUIS, JR., was called as a witness on behalf of the United States, and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Yerkes:

Q. Mr. Marquis, will you please state your name?

A. E. J. Marquis, Jr.

Q. What position do you hold with the United States Government?

A. Deputy Collector, Bureau of Internal Revenue.

Q. What are your duties as such deputy collector of Internal Revenue?

A. I have numerous duties; mainly, auditing and investigating income tax returns filed.

Q. How long have you been employed with the United States Government in that capacity?

A. Approximately five years.

Q. Prior to your employment with the United States Government, what education and experience did you have in accounting?

A. Well, I have been in bookkeeping and accounting all my life.

Q. And prior to the time you were with the Government, you were doing accounting and bookkeeping work?

A. That's right.

Q. What have been your duties since you have been with the United States Government?

A. Investigating and auditing of income tax returns.

Q. Have you had considerable experience of that kind?

A. Five years of it, yes.

[fol. 267] Q. I will ask you whether or not you have investigated and audited the case against Baker Bryan?

A. I have, Sir.

Q. Have you audited all papers and documents and statements made in reference to this case?

A. Yes, Sir.

Q. Have you, since this case began, brought your audit down to this morning?

A. Yes; we made pencil notations of the changes that occurred.

Q. You had already prepared an audit; is that correct?

A. Yes.

Q. And you have a pencil notation as to changes as the testimony has come out in this case?

A. That's right.

Q. Have you there your audit?

A. Yes, Sir.

Q. That you prepared in this case?

A. Yes, Sir.

Q. And brought down to date?

A. Yes, Sir.



Mr. Yerkes: May it please the Court, would the Court like a copy of it? We have only one that has been corrected down to the moment, but the copy is like we had it when we started.

The Court: You have only one copy?

[fol. 268] Mr. Yerkes: Only one corrected down to date.

The Court: It is more important for counsel for the defendant to have a copy than for me. While I would like to have one, I would do without it for their benefit.

Mr. Yerkes: We have here an extra copy; would the Court feel that this would be proper to give to the defendant at this time?

The Court: Are you going to use that for the purpose of testifying; do you plan to put that in evidence?

Mr. Yerkes: Yes, I do.

The Court: Then you let them have a copy so they can look at it.

(Whereupon, copy of audit testified about is handed counsel for defendant.)

Mr. Yerkes: We would offer this audit in evidence.

The Court: Go ahead and do that in the proper manner if you want to offer it in evidence.

[fol. 269] By Mr. Yerkes:

Q. Mr. Marquis, you have testified that you have made an audit of these records; is that a true and correct audit of the exhibits and testimony appearing in this Court in this case? (Indicating.)

A. Yes, Sir.

Q. Does that reflect the true status of figures, documents and testimony introduced in this case?

A. Yes, Sir.

Q. And you, as an expert in auditing, state that that is a true and correct audit, as of down to this date of the testimony, figures and documents?

A. Yes, Sir.

Mr. Yerkes: We offer this in evidence.

The Court: You offer the audit just testified to by the witness?

Mr. Yerkes: Yes, Sir.

Mr. Cockrell: (On looking over said audit.) There is an item of living expenses. I never heard any testimony offered about living expenses.

The Court: If you would like to ask this witness any questions about credits or debits on living expenses, you may. [fol. 270] Mr. Cockrell: I was under the impression that all this was based on testimony introduced in the case and there has been no testimony introduced as to living expenses.

The Court: This is not a surprise to me. If you want to ask him how he got that figure of living expenses you may do so, if you want to use it as a basis for an objection.

Mr. Cockrell: We object on the ground that the witness is here to testify and after he has testified that will be the proper time for this to come in evidence and not at the outset, I don't think. After he has testified about it we will know whether it is proper or not.

The Court: I am going to let it in evidence and hold your objection in reserve and treat it as a motion to strike.

Mr. Muskoff: I would like to add the further ground, that part of the statements contained is opinion evidence, arrived at by the Government's own accountant; next, it is a self-serving declaration on the part of the Government; further, that it is very purely his conclusions as to some of the items mentioned therein as to what the increase or decrease was and as to living expenses.

The Court: The objection is overruled. They are not valid objections to an exhibit of this kind in a case of this [fol. 271] kind. It may be received in evidence, and, Gentlemen of the Jury, I am receiving this audit in evidence at this time so we may get along with this case. If, in the course of the examination, it develops that there are some figures that should not be in there, I will instruct you to disregard it.

(Said exhibit is marked, "Government's Exhibit No. 38".)

By Mr. Yerkes:

Q. Mr. Marquis, using your tabulations that you have just testified about and which have been admitted in evidence as Government's Exhibit No. 38, I wish you would testify to the Court and Jury the manner in which you have made this examination and what you have found for the years 1941, 1942, 1943 and 1944. You may take them up, if you will, year by year; or, if there is some place where it dovetails you may explain that as you go along.

A. This audit was made, as it was brought out in the earlier testimony, on what we call a "Net Worth and Expenditures Basis".

The Court: I believe you had better tell the Jury what a net worth basis is.

A. A net worth basis is simply an increase in net worth from one year to the next year. By net worth from all capital items and expenditures that we recorded here we show where the increase in net worth came from. That is where that net worth and expenditure basis comes into the [fol. 272] picture. Establishing a net worth at the opening of the period and establishing a net worth at the close of the period, and the increase in net worth is the figure we have in the audit after each year under investigation. Those increases in net worth are substantiated by the expenditure basis of either cash or checks that we have involved. I will continue into the audit. For the year 1941 we had increases in Assets: A bank account, Florida National Bank, showed increased balance of \$1,444.08; a Skyway Club located on N. Main Street and improvements, \$125; testimony—

Mr. Muskoff: We object to that testimony until he testifies as to how he arrived at it.

Mr. Yerkes: He is giving where he gives those expenditures from the testimony of certain persons.

The Court: He will be subject to cross examination.

Mr. Muskoff: We object to the testimony now as to how he arrives at that testimony.

The Court: The objection is overruled. Go ahead.

A. (Continuing:) The \$125 was arrived at from the testimony of Lechner Lumber Co. Another improvement of \$314.08, Peaslee-Gaulbert Corporation. A \$210.00 item—

[fol. 273] Mr. Muskoff: Object to the testimony with reference to the increase by improvements by Peaslee-Gaulbert Corporation. It does not show that was capital assets; merely his opinion.

The Court: Objection overruled.

A. (Continuing:) \$210.00, All-State Pipe Co.

Mr. Muskoff: The same objection.

The Court: We will let it be a running objection, with the same ruling.

A. (Continuing:) In our original draft we had an item set up that was disallowed and we have taken that item out, \$500,—

Mr. Muskoff: We object to his testimony that he had an opinion of what the Court took out.

The Court: At the request of Mr. Muskoff you need not go into that item.

A. That makes a grand total of improvements to the Skyway Club of \$649.08. The purchase of Lot 8, Block 11, Panama Park, \$400; testimony of Mrs. George W. Clark. [fol. 274] We have furniture and fixtures for the Skyway Club consisting of \$4600; \$100 from the testimony of the F. O. Miller Piano Co. and \$4500 as the figure taken from the 1944 return of the taxpayer. Total increase for the year 1941, \$7,093.16. Decreases in assets were none. Arrived at the net increase for the year, of \$7,093.16. He had a decrease in liabilities of \$80. Payments on contract for purchase of lot; testimony of Mr. Jeffries of Fernandina Dock and Realty Co. And a total expenditure for increasing net worth is \$7,173.16. A credit of \$733.94 depreciation allowed for the year 1941. Net increase in net worth, \$6,439.27. Expenditures for automobile purchase in 1941 was, \$1,270.51. Estimated living expenses at \$6,000. Net income for the year 1941, of \$13,709.73. The year 1942, increases in assets; Bank account in the Florida National Bank, Evelyn Bryan, Special, \$209.55. Improvements to the Skyway Club, \$769.38; testimony of Lechner Lumber Co. Improvements to Skyway Club of \$1229.87; testimony of Peaslee Gaulbert Corporation. I might mention that the testimony gave a figure of \$1411.58; \$181.71 of that is an expense item, \$1229.87 is a capital item. \$151.20, Skyway Club improvements, Ingram Concrete Co. Total improvements, \$2,150.45. I have two more items that were disallowed in the testimony, that we adjusted. Purchase of real estate of the Rolling Stone, \$4,000; testimony of J. W. Harrell. \$173.25 improvements to the Rolling Stone; testimony of Robert L. Cobb. Purchase of West half of Lots 1, 2, 3 and 4, Block 1, Fernandina, \$13,350.00; Herbert W. Fishler testified to that. A piano at the Skyway Club, \$195.00; testimony of F. O. Miller, Jr. Purchase of Pete Dawson's



tavern and license, \$4,000.00. Piano purchased for Horse [fol. 275] Shoe Bar, \$87.00; F. O. Miller Piano Co. \$200, fixtures in the Pete Dawson's Bar and license; testimony of M. H. Dawson. Rolling Stone Club fixtures, \$235.10, check payable to Charles F. Satterwhite dated 3/25/42. Total increase in assets, \$24,600.35. Decrease in Assets: Decrease in bank balance of Evelyn Bryan, Florida National Bank, \$721.40. Sale of Lot 1, Section 1, Hamby's Subdivision, Fernandina Beach, \$650.00. Sale of Lot 1, Section 1, Hamby's Subdivision, Fernandina Beach, Sale of Lot 3, Section 1, Hamby's Subdivision, Fernandina Beach, \$500. House, Lot 3, Section 1, Fernandina Beach, \$6,500. Sale Lot 5, Section 1, Hamby's Subdivision, Fernandina Beach, \$500. Total decrease in assets, \$8,871.40; gives us a net increase in assets, \$15,728.95.

Mr. Muskoff: I don't recall any testimony as to the cost of that house, \$6,500.00.

The Court: I don't recall there was, either.

A. It is the trade where the West half of Lots 1, 2, 3 and 4, Block 1, Fernandina, which is in this account as an increase in assets, and he dropped an asset of Lot 1, Lot 3 and the house and Lot 5, which was an even swap. There was no money involved. No increase in assets from the sale.

The Court: That's right. It was an exchange of property and one offset the other.

[fol. 276] Mr. Muskoff: I don't recall the \$6,500 figure.

The Court: There was no \$6,500.

Mr. Muskoff: As I understand it he is placing a value on the property by that statement; there is no testimony as to any value.

By the Court:

Q. How did you fix the value of the property that you brought in as an asset that you think took the place of the property that went out?

A. The value of the property was established by talking to the realtors in Fernandina. It does not make any difference whether we put a value of \$10,000 or \$1,000 on it. They swapped one for the other. There was no increase in assets at all.

Mr. Muskoff: He was talking to people who are not before the Court. It shows a \$6,500 figure, when there is no testimony as to that figure.

The Court: Go ahead.

A. We have an increase in liabilities; \$3,000 mortgage, Gulf Life Insurance Company. That was an original mortgage of \$4,000 and reduced to \$1,000 by check; testimony of Gulf Life Insurance Co. Note to Fishler and J. W. Askins; [fol. 277] interest, \$1200; testimony of Fishler and Askins. Decrease in liabilities, Fernandina Dock and Realty Co. contract, \$275.00. Net increase in liabilities, \$3,925.00. Total expenditures increasing net worth, \$11,803.95. Depreciation allowed, \$1,875.00. Increases in net worth, \$9,928.95. Expenditure for automobile, \$1,053.61. Living expenses, \$6,500. Net income for the year 1942, \$17,482.56. For the year 1943, Increases in Assets: Bank Balance, Florida National Bank, Evelyn Bryan, \$510.03. Bank Balance of J. Baker Bryan, Atlantic National Bank, \$656.09. War bonds purchased, \$500; check dated 1/4/43.

Mr. Yerkes: I would like to offer matters pertaining to checks, which will be testified about from time to time. Can I do that now?

The Court: You are going to introduce them through this witness?

Mr. Yerkes: Yes, I think I can do that quickly.

The Court: Go ahead.

Q. At the time you made this examination of the preliminary part, did Mr. Bryan turn over to you certain checks of Evelyn Bryan and Baker Bryan for your examination?

A. No, Mr. Muskoff turned them over to you.

[fol. 278] By the Court:

Q. Mr. Muskoff did it as attorney for the defendant.

A. Yes, Sir.

Q. Where are those checks now?

A. They were returned to Mr. Muskoff.

Q. Did you take a notation of all those checks?

A. Yes, Sir.

Q. And when you testify now about checks, they are from those checks?

A. Yes, Sir.

Q. Have you a list of those checks there?

A. Yes.

Mr. Muskoff: I object to that. It doesn't show that he still had the funds at the end of the year. In other words, he is taking it as an increase without showing that he still had the funds at the end of the year.

The Court: We haven't come to that yet.

A. I think that is all for the years we have under investigation. (Hands papers to Mr. Yerkes.)

Q. These are all excerpts taken from checks delivered to you by Mr. Muskoff, as attorney for Baker Bryan, the defendant?

A. Yes.

Mr. Yerkes: We will offer this as one exhibit; there is a summary sheet attached.

[fol. 279] Mr. Muskoff: We object to the offer, not on the ground that it is not the best evidence; we wish to waive that; but on the ground that many of those checks referred to there are not checks of the defendant, Baker Bryan, but are checks for a woman by the name of Evelyn Bryan, obviously Mr. Bryan's wife, who is not charged here at all; and I don't think they should be admitted as to Baker Bryan for any misgiving she may have done.

The Court: The objection overruled. Let it be filed in evidence.

(Same is marked, "Government's Exhibit No. 39".)

By Mr. Yerkes:

Q. You can now use Government's Exhibit No. 39 that you have just testified was certain information that you gained from checks given you by Mr. Bryan's attorney, Mr. Muskoff; and I also have here the four exhibits, being Government's Exhibits 1, 2, 3 and 4, which are the income tax returns for the years in question.

A. In his increase in assets for the year 1943, equipment for the Skyway Club, \$176.65; Harmon Fixture & Equipment Co. Materials, Lechner Lumber Co., \$125.00. Materials, \$443.23. French Mirror Plate Glass Co. Total increase to Skyway Club, \$744.88. Showboat; purchase of boat, \$2,625; testimony of W. Y. Laing. Purchase of Brack's business, \$1600; testimony of Mr. Brack. Purchase of piano

at the Horse Shoe Bar, \$69.00; F. O. Miller Piano Co. Skyway Club Furniture, of \$422.61; no testimony.

[fol. 280] Mr. Muskoff: I want to make an objection and move to strike the testimony with reference to the assets of Showboat, because the testimony shows that there was one man that invested considerable money in it and paid a lot of the bills on the Showboat, Mr. Stokes, and afterwards sold to Mr. Baker in one lump sum all those assets that he had paid for.

The Court: We thrashed that out at the time the testimony went in, and as to that circumstance I overrule the objection.

A. The Showboat Club furniture and fixtures, \$500.

Mr. Muskoff: I want my running objection to this testimony.

The Court: You may have it; same ruling.

A. The testimony of Charles E. Stokes, Jr. and W. Y. Laing. Purchase of chairs for the Showboat, \$535.50. The testimony shows a half-interest partnership to Charles M. Stokes; we took into account \$267.75 only. Purchase of Stokes' interest in the Showboat, \$2,000; testimony of Charles M. Stokes. Equipment purchased for Showboat, \$647.00, taking into account \$223.50, half-interest to Stokes. Merchandise inventory at close of the year, \$5,000, in 1944 return. Increases in Assets, total, \$15,218.86. Decrease in Assets: Bank balance decrease of Evelyn Bryan, Special [fol. 281] account, Florida National Bank, \$209.55. Net increases in assets, \$15,009.31. Decreases in Liability: Mortgage paid, \$4,000; testimony of Ike Witten. \$1,000 payment on the mortgage of Gulf Life Insurance Co.; testimony of Gulf Life Insurance Co. Total decrease, \$5,000. Less increase in liabilities of deferred payments due, \$433.23. Total expenditures to increase net worth, \$19,566.08. Less depreciation credit, \$3,545.27. Increase in net worth, \$16,020.81. Automobiles, \$595.14. Living expenses, \$7,000. Total net income for the year 1943, \$23,615.95. For the year 1944, Increases in Assets: Decrease in bank balance, in the Florida National Bank & Trust Co. of Miami, of J. B. Bryan, \$1,016.68. Improvements to Skyway Club, \$1237.83; testimony of Peaslee Gaulbert Corporation.

Mr. Muskoff: We object to the increase in the bank balance of the Florida National Bank. The Florida Na-



tional Bank didn't testify as to what he had at the end of the year; he merely had a month's or a two months' statement.

The Court: Objection overruled.

A. Improvements to Skyway Club, \$1697.36; testimony of Foley Lumber Co. \$98.35, French Mirror Plate Glass Co.; \$350 check, No. 1378, dated 7/5/44, payable to H. H. Chan-  
cey; \$150 check, No. 1479, dated 10/14/44, to J. W. Johnson. Total improvements to Skyway Club, \$3,533.54. Purchase of Victor's Drum, Miami, \$45,438.72; testimony of Dade Commonwealth Co. of Miami. Purchase of 201-211 E. Bay Street, Jacksonville, \$31,047.12; testimony of Paul Hoffman. Remodeling—

[fol. 282] Mr. Muskoff: There is no testimony to that effect. That is again a trade; there is no value fixed.

—The Court: Objection overruled; go ahead. A Remodeling, \$3122.52, check 5/18/44, \$00; June 2, 1944, \$657.32; July 14, 1944, \$353; July 21, 1944, \$260; September 1, 1944, \$752; September 27, 1944, \$300. All payable to J. H. Smith, Contractor. Purchase of 1315 Newnan Street, Jacksonville, \$7,500.00; testimony of George W. Hess. Purchase of a residence in Miami, 2825 S. Miami Avenue, \$30,000.00. Purchase of Windmill Club property, \$11,500.00; testimony of James M. Shields. Equipment, \$259.80, Harmon Fixture & Equipment Co. Plumbing, \$1,131; Walter Denson & Son. Total, \$12,890.80. Purchase of Lot 4, Block 11, Panama Park, \$500; Mrs. George W. Clark. Lot 8, Block 12, Panama Park, \$2,000; Mrs. George W. Clark. Exchange of assets, Seminole Beach Club trade for Lot 6 through 9, Block 9, Section D, Englewood, and a \$5,000 mortgage; testimony of George Holland. Skyway Club furniture, \$630.50; Schedule F of 1944 Return. Windmill Club furniture, \$2,500; Schedule F, 1944 Return. Showboat Club purchase of piano, \$500. Monies in escrow, \$2,370; check dated 5/13/44 for \$970 payable to American Federation of Musicians, check of July 6, 1944 for \$900 payable to Harrell & Perrine, marked "In Escrow", check dated 9/6/44 for \$500 payable to A. G. V. A. marked "Money in Escrow". Total increases in Assets, \$143,049.88.

Mr. Muskoff. We object to the money in escrow. It is not shown that that money was in escrow for the full year.

[fol. 283] The Court: Objection overruled. If you can, straighten it out.

Mr. Muskoff: We are not in a position to straighten it out. You can't get the musician's people to open up their books. If you are charging that up as an increase in assets, you will have to show that it was still there at the end of the year.

By the Court:

Q. Can you show that?

A. No, Sir.

Q. You don't know that it was there at the end of the year?

A. We don't know that it was not there, either.

Q. That is not the answer. How much of that money was in escrow?

A. \$2,370.00 in escrow.

Q. It was placed in escrow during that year?

A. Yes, Sir.

Q. And you are not in a position to testify that it was in escrow at the end of the year?

A. No, Sir.

The Court: And you have offered no testimony that it was in escrow at the end of the year?

Mr. Yerkes: That is correct, Sir.

[fol. 284] The Court: Then we will reduce that figure that much. You just readjust your figure there by taking that out. (Witness makes adjustment on audit as directed.)

A. A corrected total increase in assets, \$140,679.88. Decrease in Assets: Balance in bank balance of Florida National Bank, \$316.93. Decrease in bank balance, Atlantic National Bank, \$451.27. Brack's Little Club was sold and decrease in assets of \$1600. Exchange of the Esquire Club, Fernandina; decrease in assets of \$11,400; fixtures, \$3,500.00. Sale of Lots 10, 11 and 12, Flagler Tract, Jacksonville Beach, \$14,500. Piano at Horse Shoe Bare trade-in, \$261.00. Merchandise inventory decrease, \$2,500. Total decrease in assets is \$34,529.20. Net increase in Assets, \$106,150.68. Increase in Liabilities: Mortgage, W. D. Rumbaugh, \$22,500; testimony of W. D. Rumbaugh and National Title Co. Mortgage to the Atlantic National Bank, \$16,147.12; testimony of Atlantic National Bank. Deferred charges, \$156.54; Showboat piano and balance due on the account of the French Mirror Plate Glass Co. Total increase in liabilities, \$38,803.66. Decreases in Liabilities: Reduction of mortgage, Atlantic National

Bank, \$1322.66. Reduction of mortgage of Gulf Life Insurance Co., \$1,000. Payment of note to J. M. Askins, \$1200. Deferred charges paid, \$443.23. Total of decrease in liabilities, \$3,788.07. Net increases in net worth, \$67,312.91. Depreciation allowed, \$3,788.07. Net increases in net worth, \$67,524.84. Automobiles, \$6,895.00. Living Expenses, \$7,500. Net income for the year 1944, \$81,919.84.

Q. Mr. Marquis, how is the value of property received in a trade established; will you explain that to the jury so that they will understand it?

[fol. 285] A. Well, in this one particular trade here, the value of the cost of the property trade was known. In an even swap the value is transferred to the property received. I don't know which one you had reference to. There are two different ones here.

Q. You might explain the several trades here. I believe there was only about four.

A. One trade of the Seminole Club for four lots and a mortgage was established by the seller, \$9,000 value, that is in the testimony.

Mr. Muskoff: Object to that. The testimony there was that somebody had agreed that they would put that in at \$4,000. That certainly doesn't establish any value. If we had a condemnation case I could not come in and put that on the thing as a value.

The Court: If this were a suit on an account, the objection would be good. This is not such a suit as that and the income tax people have to do the best job they can in a case like this, and the Court and the Jury and counsel and the defendant have to put up with it. The defendant has the same opportunity to testify to these values that the Government witnesses do, and if he thinks any of them are wrong we will let him testify with reference to that. This is the best we can do. Where they don't place a value it is the obligation and duty of these gentlemen who are auditing this account to go out and establish a value. It does not matter whether this particular piece of property is worth Five or Ten Thousand Dollars in [fol. 286] the final analysis; they are not fixing value; and that is why we have to be a little more liberal in cases like this than you do in an account.

A. Do you want me to give another explanation of how I arrived at the value?

The Court: Yes.

A. In the exchange of the property owned in Fernandina for property of Mr. Hoffman, known as Bay and Newnan Street, the value of the property exchanged plus the mortgage assumed was the value placed on the property received. This value of the property owned was established through testimony from the purchaser in a previous year and later exchanged for the property in Jacksonville and assuming a mortgage outstanding against that property established the value of the property received. That is the only two cases we have here.

By the Court:

Q. I want you to give me the total amount of the net income on which the tax is due for 1941 and 1943.

A. 1941 is \$13,709.73.

Q. And 1943?

A. 1943 is \$23,615.95.

By Mr. Yerkes:

Q. I have not been tabulating and I would like to get the 1942 and 1944 net income.

A. 1942 is \$17,482.56; and 1944, after the correction, is \$81,919.84.

[fol. 287] Mr. Yerkes: Your witness.

Cross-examination.

By Mr. Muskoff:

Q. By your figures, I take it, you assume that all the money that Mr. Bryan spent during those years was money made during those years?

A. Yes, Sir.

Q. You assume, then, that he had no money at the beginning of 1941 and showed up with this additional money that he made from 1941 to 1944?

A. Yes, Sir.

Q. That is the basis of your figures; is it not?

A. Yes, Sir.

Q. If that is not true, then your audit is wrong; is it not?

A. No.



Mr. Yerkes: Object; he is calling for an opinion. I don't think it is a proper question.

The Court: That calls for an opinion.

Q. If Mr. Bryan, during the years 1941, 1942, 1943 and 1944 sold property that you have no account of, then your calculation as to his gains would be wrong again; would it not?

[fol. 288] Mr. Yerkes: May it please the Court, this statement, he says is wrong. I object to that.

Mr. Muskoff: I will change it to "erroneous."

The Court: Do you like the word, "erroneous" better, Mr. Yerkes?

Mr. Yerkes: I think the question is improper on the ground that the witness is testifying from all the evidence he was able to elicit from Mr. Bryan, and the facts, figures and testimony before him. Mr. Bryan had not disclosed to him that he had other property sold when he had a chance to.

The Court: Do you mean by your question that if this defendant had assets in those years that the Government had not been able to find out about—?

Mr. Muskoff: That the Government has not taken the trouble to find out about.

The Court: —and was not included in these figures, then these figures would be wrong?

Mr. Muskoff: Yes, Sir.

[fol. 289] The Court: Of course, that is a question that the answer to is not very important. It might be wrong to the extent that the defendant owed more taxes than the Government can show here.

Mr. Muskoff: Not necessarily. If I had a \$10,000 piece of property that I bought in 1940, or prior to 1941, and sold it in 1944 for \$10,000 I have shown no taxable gain; I would be merely getting rid of an asset.

The Court: That, of course, would be true, and to that extent, and if that is the purpose of your question, to that extent I will let him answer that question.

By the Court:

Q. If you overlooked any assets that this defendant had, in your calculations, then your calculations would be in error, or subject to revision?

A. Yes, Sir.

By Mr. Muskoff:

Q. Did you check the records of Duval County as to the sales of property made by J. B. Bryan or Evelyn Bryan, or both of them, during the years of 1941 to 1944?

A. Yes.

Q. How did you make that check?

A. By a search of the Court records for transfers of title of property to or from J. Baker Bryan or Evelyn Bryan, or J. Baker Bryan and Evelyn Bryan.

Q. You made that just as accurately as you made the rest of your report?

[fol. 290] Mr. Yerkes: Object to that.

The Court: Objection sustained.

Q. Do you have a sale of Lots 10, 11 and 12 of Flagler Tract, Jacksonville Beach during the year 1944 in your calculations?

A. Yes, Sir.

Q. You have the sale of those lots for how much?

A. \$14,500, lots and building on the lot.

Q. Do you have a sale of a whiskey license that was purchased from Pete Dawson and sold to Harry Nottman on or about July 12, 1944, as carried on the books of the State of Florida, in the Hildebrandt Building?

A. We show the purchase.

Q. I mean the sale to Harry Nottman.

A. No.

Q. Do you have the sale of the stock on records that you have testified about, on the Showboat, to this same person on the same date?

A. We show a reduction in inventory in stock on hand.

Q. Do you show a sale of a certain parcel of land, Lot 2, Hayworth Kepler Subdivision, Section 38, Township 1, South Range 29, according to Plat recorded in Deed Book A. G., page 212, F. D. R., particularly described as follows, and I will give you a further description: "Beginning at a point in the center of the Shore Road, which point lies in connection with the East line of First Street and said East line as projected northward, etc."

A. That was not a sale, that was an exchange of property.

[fol. 291] Q. That is the way you have it?

A. The property was exchanged for lots in Englewood and a \$5,000 mortgage.

Q. Do you have the sale of Lots 9, 10, 11, 12, 13, 14 and 16 of Block 35, Oakwood Villas?

A. Yes.

Q. For how much?

A. That was bought and sold within a year; it does not come into account on the increase in assets. We have a record of the sale.

Q. Do you have that in your account?

A. It does not take into account; it went in and out within the year. It does not appear on the increase in assets or increase in net worth.

Q. Do you have a sale for the year 1941 of Baker Bryan and Evelyn Bryan to Jerry Nichols Buchanan of Lot 5, North 20 feet of Lot 6 and 7, Block 11, Panama Investment Co. Subdivision of Panama Park?

A. We don't have that asset on the net worth scale. It was bought in prior years.

Q. It was bought March 4, 1941, is that prior to what you testified about?

A. No. I don't have that; not as that description.

Q. I here hand you an original title slip of the Title & Trust Co. and ask you whether or not that sale was made during that year.

A. I would not know, sir. There was evidently a sale made. It shows a conveyance from Baker Bryan and Evelyn Bryan to Jerry Nichols Buchanan.

Q. It further shows a State tax of \$4 paid, and Federal stamps of how much?

A. \$4.40.

[fol. 292] Q. How much would that be on the value of the land sold?

A. I would estimate, \$4,000.

Q. That you have omitted from your 1941 tabulation?

A. We don't have that asset on the tabulation.

Q. How much gain did you have for the year 1941?

A. I don't understand your question.

Q. What was the net income for 1941?

A. Do you mean increase in net worth?

Q. Yes.

A. \$13,709.73.

Q. If he sold a piece of property during that year, that would be not that great?

A. Not necessarily.

The Court: Was that a purchase or sale?

Mr. Muskoff: That was a sale by the defendant.

The Court: In 1941?

Mr. Muskoff: Yes, 1941.

The Court: And the witness testified that the property is not included in his tabulation as a net asset?

Mr. Muskoff: That's right.

[fol. 293] By Mr. Muskoff:

Q. Have you taken into consideration in your figuring net worth that he sold property for the years past, prior to 1941, amounting to considerable thousands of Dollars?

A. My investigation was for a period of years, but I understand it is 1941 to 1944 that I am testifying to.

Q. If he had this money prior to that time, would you call it a net capital gain; if that was money that he invested that he saved prior to January 1, 1941, then there would be no capital gain; would there?

The Court: This witness has testified that he started out with his net capital on January 1, 1941. Now, the Court is not going to let the Government get into any questions as to whether or not he had correctly or incorrectly reported his income tax for years prior to 1941. We started here with the figure of his net worth in 1941, on January 1 of that year, and we wound up with the net worth at the end of that year. If your question goes into the question of the amount of his net worth on January 1, 1941, you may ask for that figure.

By Mr. Muskoff:

Q. Do you know with any accuracy Mr. Bryan's net worth on December 31, 1940?

Mr. Yerkes: Object to that question; "with any accuracy".

The Court: Let's just forget about it. Give the Jury the figures you started with on January 1, 1941.

[fol. 294] A. \$107,108.00 even.

Q. How did you arrive at that figure?



A. It was his total assets as of December 31, or January 1, 1941.

Q. How did you arrive at that figure?

A. How do you mean, how did I arrive at it?

Q. How did you arrive at his total assets as of that date?

A. The total tabulations that we found that he owned as of that time.

Q. How did Mr. Bryan carry on his business, as far as you know; that is, did he pay cash prior to that time, or had he kept his money in a checking account?

A. He opened up his first account during the period of 1940.

Q. That was the first time he ever had a bank account in his life, as far as you could find out?

A. As far as I could find.

Q. During 1940 he acquired a hundred and some odd thousands of Dollars, according to your estimate of his assets, and never had a bank account up to 1940?

A. I would not say that.

Q. I mean as far as you could find.

A. As far as I know.

Q. Therefore, you made a search for bank accounts; did you not, prior to that time?

A. Yes.

Q. You made a search of all the banks that you might find a bank account in?

A. Yes.

[fol. 295] Q. So if he was doing like so many persons in his particular trade and profession did with the cash, you would have no way of estimating that?

A. I would not estimate it.

Q. Then that had not been taken into account?

A. What happened prior to 1941—

The Court: Mr. Muskoff, the question implies that if he had improperly made income tax returns prior to 1941—

Mr. Muskoff: I don't imply that at all.

The Court: Yes, it does; and that they haven't taken that into account. You are the attorney for the defendant, you know.

Mr. Muskoff: I don't mean to imply that.

The Court: We start here with a definite figure, and so far as the jury is concerned they have got to assume that this defendant has been perfectly honest with the Govern-

ment up until 1941 and the defendant has the right to have me tell them that and I propose to tell them that, and I do tell them that now.

Mr. Muskoff: The thing you overlooked was a statement taken from Mr. Bryan by these Government officials in my presence as to his assets prior to 1933, your Honor.

[fol. 296] Mr. Yerkes: If he is going to make a speech, I will ask that the jury go outside.

The Court: I am responsible for a little bit of that; go ahead, Mr. Muskoff.

By Mr. Muskoff:

Q. You heard the Government's testimony, and you checked, yourself, I assume, that Mr. Bryan or his wife had safety deposit boxes prior to January 1, 1941; did you not?

A. The testimony was introduced, yes.

Q. What did you find from your investigation?

A. We opened the safe, if that is what you want to know.

Q. No; I mean what did you find as to how long he had had a safety deposit box?

A. I would not attempt to say; I don't have the records.

Q. But they were prior to 1941?

A. Yes.

Q. And you don't mean to say that he had no money whatsoever other than what is shown on that bank account, shown on January 1, 1941?

A. I didn't say that.

Q. Doesn't your audit assume that?

A. That is all the money we could account for.

Q. That is all the money you could account for; but if he had money prior to that time then your audit does not reflect that; is that true?

[fol. 297] Mr. Yerkes: That goes straight back to the proposition that the Court stated. We are presuming him innocent, and not presuming him guilty, of anything back of those four years.

The Court: I am going to put an end to this cross-examination along this line for the reason that it is not in cross of anything brought out on direct examination. If this defendant offers testimony to the effect that all these assets shown here were in a black stocking in January, 1939, then

that question gets into the case; but until that happens I don't think that line of testimony is correct. I am going to put an end to it now. I don't think it is coming into the case, but if it does we will go into that matter.

By Mr. Muskoff:

Q. Do your records show that in 1936 J. Baker Bryan and his wife, Evelyn Bryan—J. B. Bryan, also known as J. Baker Bryan, and wife, Evelyn, sold property to Ed. McKinnon, Lots 7, 9, 10 and 11, for a consideration?

Mr. Yerkes: That is far beyond the issue.

The Court: I sustain the objection; that is not in evidence in this case.

Mr. Cockrell: The Court does not begin with the assumption that this defendant had no property on the first of January, 1941?

[fol. 298] The Court: No, but I have limited the Government in its proof to the periods involved. I am not permitting them to bring into this case anything about purchase and sales of 1938, 1939 and 1940, so of course this witness has not taken that into consideration. Now, if you gentlemen are going to build up—and you have a perfect right to do it—an asset of more than \$104,000, or whatever that figure is, as of that date, then you will have the Government in a box and we will see them sweat out of it.

Mr. Cockrell: The defendant begins with the presumption of innocence. There is no presumption that he had no money at the beginning of 1941.

The Court: I made this witness testify as to the amount of capital assets that he started with in 1941.

Mr. Cockrell: He testified that he knows of certain ones and does not know if there are others or not.

The Court: If you want to show that he had an asset of a half million Dollars before 1941 you have a perfect right to do it; but I am not going to let you ask this witness the question. "You didn't know he had this asset prior to 1941, did you?" We will not deal with any purchases or sales that have not been brought into this case by the Government, that took place prior to 1941, on cross-ex-  
[fol. 299] amination. I am not limiting you to show the amount of his assets that he had on January 1, 1941.

Mr. Muskoff: If I can call to his attention some error that he made——?

The Court: No; that is what I thought you were trying to do, and it does not show anything. That is why I am stopping you.

Mr. Muskoff: I would like an exception to your ruling and statement.

The Court: Very well.

By Mr. Muskoff:

Q. Who appraised those assets that you testified that Mr. Bryan had on December 31, 1940?

A. They were not appraised.

Q. How did you arrive at that figure?

Witness: Shall I answer that, sir?

The Court: Yes, he is entitled to know how you arrived at the amount of the assets that you credited him with on January 1, 1941.

A. Through evidence of purchase of these assets in prior years.

[fol. 300] Q. And you took into consideration only recorded purchases that you could find?

A. That was all I could.

Q. That was all you could?

A. Yes.

Q. During the course of examining Mr. Bryan, did you inquire into the cash sales that he made prior to that time?

A. No.

Q. Did the Department, or someone in your presence in one of the Government Departments, make inquiry into that?

A. I would not know.

Q. Where is the list of assets that he had at the beginning of 1941?

Mr. Yerkes: That is nothing in cross of what was brought out on direct; and, as your Honor says, we had no way to put it in and now they are fishing.

The Court: I am going to let him give us the information he had with reference to the assets that this defendant had on hand on January 1, 1941. Give us a breakdown of that one hundred and some odd thousand dollars.



A. He had \$40.70 in the Florida National Bank——.

Mr. Cockrell: I understand it is on this paper (indicating) and I haven't seen it on this paper. I understand this piece of paper is a duplicate.

[fol. 301] Witness: That covers the increase in assets for 1941, 1942, 1943 and 1944; it is not mentioned on Mr. Bryan's net worth at any period.

A. (Continuing.) A piece of property, Section 26, Township 1, S. Range 28 East, better known as McKinnon's Place, Bay Shore Drive, \$5,500.

Q. How do you arrive at that figure?

By the Court:

Q. Was that sold during that period?

A. That continued on in his ownership all through the period.

Q. Then you can forget how you arrived at it. Go ahead.

A. (Continuing.) Lot 1, Section 24, Township 1, S. Range East, known as Skyway Club, \$36,375.06.

Q. When did you arrive at that figure; what date?

A. Prior to 1932.

Q. Do you arrive at that date prior to 1932?

A. Yes.

Q. But that's not as of 1940, December 31st.

A. I think the taxpayer's own return shows the valuation of that piece of property for depreciation purposes.

Q. What you are basing it on is the amount set up for depreciation purposes?

A. No, I am not basing it on that.

The Court: Go ahead.

[fol. 302] A. Lot 1, 2 and 3, Block 11, Panama Park, \$1,000. Lot 9, Panama Park, \$4,623.70. Lot 10 and 11, Panama Park, \$2,700. Lot 1, Block 14, Panama Park, \$3,500. Lot 7, Block 12, Panama Park, \$2,000. Lot 10, 11 and 12, Flagler Tract, First Street and Second Avenue, Jacksonville Beach, \$14,500, less outstanding mortgage of \$4,000. Section 24, Township 2, S. Range 20 East, Atlantic Blvd. and Canal St., \$1.00. Lot 2 and 3, Division 6, Kelly's Subdivision. Seminole Beach Club, \$9,000. Lot 1, Seminole Beach \$2,000. Lots 4 and 5, Silver Terrace,

\$1600. Lots 7, 9 and 11, Silver Lake Terrace, \$2,100. Lot 1, Section 1, Hamby's Subdivision, Fernandina Beach, \$650. Lot 3, Section 1, Fernandina Beach, \$7,000. Lot 5, Section 1, Hamby's Subdivision, Fernandina Beach, \$500. Lot 7, Section 1, Hamby's subdivision, Fernandina Beach, \$400. Outstanding contract against that piece of property \$355. Lots 9, 10, 11, 12 and 13 and 14, Askins Five Points, known as the Esquire Club, \$11,400. Furniture and fixtures at Esquire Club, Fernandina, \$3,500. Skyway Club, Main Street Road, furniture and fixtures, \$2,772.60. Total assets, \$107,108.00, as of December 31, 1940.

By the Court:

Q. Is that the figure you started with?

A. Yes, sir.

By Mr. Muskoff:

Q. Yet up until that time you had never found a bank account, up until 1940, that Mr. Bryan had?

A. No.

Q. And yet you assume that the only monies he had were in the bank on the first day of January, 1941?

[fol. 303] A. That is all we took into account.

Q. You don't know whether he had a lot of other money, or not?

A. No, sir.

Q. In going over this I see you charged all the mirrors sold by French Mirror Plate Glass Co. to the Skyway Club as a capital asset and then took a description.

A. Are you talking about this other paper, or this paper (indicating)?

Q. On the other paper.

A. What is that item?

Q. The item from the French Mirror Plate Glass Co. for the Skyway Club; you considered that as a capital asset?

A. Yes.

Q. If those mirrors were bought to replace mirrors that had been broken in the conduct of that business during that yearly period, would that be a capital asset?

A. In a sense, yes. It would be replacing a destroyed capital asset.

Q. Assuming they had to be replaced three times within these same years——?

Mr. Yerkes: We are going on a presumption; there is no testimony shown here——.

Mr. Muskoff: He is assuming to begin with I think that in a case where you have a night club where mirrors are known to be very fragile things and you buy mirrors on different dates to replace others at different times of the [fol. 304] year, no one can say that is a capital asset. When a mirror is cracked you have that seven years' bad luck, and that's all there is to it, and you get a new mirror.

The Court: You are questioning the fact whether that should be included as a capital asset on the other exhibits?

Mr. Muskoff: That's right.

The Court: I have no objection to your asking this witness whether or not he knows, as to his own experience, whether or not the French Mirror Plate Glass Co.—that the glass has such short life—whether it is classified as an operating expense or a capital item.

A. It is classified as a capital item.

Q. That is the way you classified it?

The Court: He has regulations in doing it.

By the Court:

Q. Under the Internal Revenue regulations it is classified as a capital asset?

A. Yes, sir.

By Mr. Muskoff:

Q. Even if replaced twice within the same year?  
[fol. 305] The Court: If they are wrong in their classification, you and I will have to get them to correct it.

Q. Did you check with the Beverage Department of the State of Florida to show any licenses he purchased for the year 1944?

A. I did not.

Q. Those records are readily available; are they not?

Mr. Yerkes: Object to that——

The Court: They are readily available. Any of us knows that. If you know the answer to it, say so.

A. Yes, they are available.

Q. Thereafter, on or about July 1, Mr. Bryan sold his license to Harry Nottman, that was on the Showboat—

The Court: If he sold for more than he paid for it, it would be more than the capital gain shown in the account.

Mr. Muskoff: Let me make myself clear to the Court and Jury. Here we have a list of so much money spent by Mr. Bryan, which, as I understand it, is charged up to him as a net gain over this period of years, and if everything that he bought with this money that was charged up to him as a net gain he disposed of during those years either for the [fol. 306] same amount or a profit, then his net gain would not be as much as shown in this audit; that's what I am trying to bring out.

The Court: What I was attempting to suggest was that you ask him a question that he can give a "yes" or "no" answer to. I was trying to save time.

By Mr. Muskoff:

Q. As to living expenses, did you check Mr. Bryan's living expenses? Or, did you estimate those?

A. These are estimated figures.

Mr. Muskoff: That is all.

By the Court:

Q. I want to ask you a question or two. Did you call upon the defendant to produce his books of account that he kept of his various activities?

A. Yes, sir.

Q. Tell the Jury what you found in the nature of records.

A. Mr. Bryan furnished us with a—I would classify it as a Cash Journal—a book of record showing the cash receipts, disbursements in the operation of his Skyway Club and Windmill Club, with a few notations as to personal items on which checks had been drawn, a few notations of investments of checks. He also furnished us with records of payrolls for 1941 and 1942; a cash journal book that I have reference to for the years 1943 and 1944. He also [fol. 307] furnished us with, I would estimate, five thousand or more waiter's checks from the Windmill and Skyway Clubs, with a taped tabulation on it; a daily tape to substantiate the gross receipts of that day. We were also



furnished at a later date with his canceled checks and bank statements by his attorney, on order, I presume, of Mr. Bryan. Those were the records we were furnished.

By the Court:

Q. Those were the only records made available to you?

A. Yes.

Q. As far as you were aware, he kept no other books of account of his operations?

A. I don't know of any others.

By Mr. Muskoff:

Q. Mr. Marquis, at 10 A. M. on March 26, 1946, Mr. Bryan presented himself to you for personal examination and others, readily; did he not?

A. He came up in the office and I would not state what date it was, or what time it was; it was in your presence.

Q. As well as your presence?

A. Yes. I would not state what date or what time it was, but he came up on one occasion and he came up the second time to make some clarification of statements that he had made.

Q. At that time you inquired as to where he kept his money; or one of the agents did?

A. It is all in that record. I don't have a copy of it with me; that is Mr. Bryan's signed statement.

[fol. 308] Mr. Muskoff: That is all.

Mr. Yerkes: The Government rests.

Mr. Muskoff: We would like to make a motion.

The Court: Gentlemen of the Jury, I am going to give counsel for the defendant until two o'clock to get ready to go into their testimony and you gentlemen please be excused until two o'clock this afternoon and quietly leave the Courtroom now.

(Whereupon, the Jury retires from open Court, and the following proceedings were had:)

Mr. Muskoff: I would like to recall, before we make our motion, Mrs. Rawley, in view of the testimony that has been given with reference to Mr. Bryan's books and records.

Mr. Yerkes: We object to the recalling of Mrs. Rawley. She is available to the defendant as his witness.

The Court: What do you want to recall her to examine her about?

[fol. 309] Mr. Muskoff: There has been testimony here as to the books that he gave her, that were furnished them, and she had a list of those books, and you asked what was furnished them.

The Court: You may call her as a witness, but to recall her for further cross-examination along that line is not important. What I was attempting to do from this witness that just left the stand was to ascertain whether or not the defendant had any further books than what was testified to by the witness you refer to. We didn't ask her about all the books; what we asked her was where did she go to get her information to make up these income tax returns and she told us. We had her in a different category and developed some different information. I overrule your motion to recall her for further cross-examination, but you may call her as your witness.

Mr. Muskoff: Comes now the defendant and moves the Court for a motion for judgment of acquittal on the indictment, and each count thereof, upon the following grounds, severally:

(1) That the evidence introduced by the Government is wholly insufficient and does not support the material allegations contained in each count, severally, of the indictment. (2) That the evidence introduced by the Government is not sufficient to support any issue of fact required for its admission to the Jury. (3) That the evidence introduced by the Government is insufficient and does not meet [fol. 310] the requirements prescribed by law to support the charge set out in each count of the indictment, severally. (4) That the evidence introduced by the Government herein is just as consistent with the innocence of the defendant as it is with his guilt, and for that reason it does not meet the requirements prescribed by law. (5) That the evidence fails to show any wilful attempt on the part of the defendant to evade the tax alleged to have been evaded in each count of the indictment severally. (6) That there is no proof by any witness on behalf of the Government that the defendant wilfully and knowingly attempted to defeat and evade a large part of the income tax due the Government. (7) That there is no adequate proof as to the net worth of the defendant on the 31st day of December, 1940. (8) That

there is no presumption that the money spent by the defendant in the years involved is money which he acquired in those years. In other words, the defendant, during the years in question, may have spent money which he acquired in previous years and there is no proof or presumption to the contrary.

The Court: Are those all of your grounds?

Mr. Muskoff: Yes, sir.

The Court: I don't think it is necessary to argue your motion for a judgment of acquittal and the same is denied.

[fol. 311] (Whereupon, a recess was had for lunch and at 2 o'clock in the afternoon Court reconvened and the following proceedings were had:)

Mrs. EVELYN BRYAN was called as a witness on behalf of the Defendant, and, being first duly sworn, testified as follows:

323 Direct examination.

By Mr. Muskoff:

Q. Please state your name.

A. Evelyn Bryan.

Q. Are you the wife of the defendant, J. Baker Bryan?

A. Yes, sir.

Q. What year were you married to Mr. Bryan?

A. 1926.

Q. Mrs. Bryan, did you ever have a safety deposit box or boxes in the Florida National Bank?

A. Yes, sir.

Q. What did you use those boxes for?

A. To keep money, deeds, and so forth, and such things as that.

Q. Did you ever have any other safety deposit box in the Florida National Bank?

A. I had two, that's all.

Q. Two safety deposit boxes?

A. Yes, sir.

Q. When you married Baker Bryan in 1926, did he have any money?

A. Yes, sir.

[fol. 312] Q. Did he have much money?

A. About \$180,000.00.

Q. How did you keep that money?

A. We kept it in a safe; the safe was in a closet.

Q. Did you ever deposit that money in any bank?

A. No, sir.

Q. What did Mr. Bryan do at that time to make a living?

A. He was selling whiskey.

Q. How did he buy and sell his whiskey, for cash or check?

A. I think most of it was cash.

Q. Did you ever have a checking account prior to 1940, to your knowledge?

A. Not that I can remember.

Q. In 1940, when you started the checking account, how did that happen?

A. I began to help him out there at the Skyway Club. I had whiskey bills and various bills such as that to pay for the place and I gave checks in order to keep up with it.

Q. Why did you want to keep up with it?

Mr. Yerkes: Object to his leading questions.

The Court: Don't lead the witness.

Q. Prior to that time, and up to that time, where did you keep all that money?

A. We kept it at home.

[fol. 313] Q. How did you happen to first get a safety deposit box?

A. Well, while my children were small I didn't mind staying home all the time and I finally got tired of it. I got a deposit box.

Q. How much money did you have in 1943—1940, I think it was—when you opened that safety deposit box on November 4, 1940; do you remember about how much money you put in that safety deposit box in cash?

A. I imagine between—I am not sure, but I imagine around One Hundred Fifty to One Hundred Sixty Thousand Dollars.

Q. When you bought the cashier's check for \$40,000 from the Florida National Bank, where did you get the money?

A. From the deposit box.

Q. Had that money been put in there recently?

A. It was put in there when I got the box.



Q. Had you ever added any money to that box after you put it in there?

A. No, sir.

Q. Now, there was a special account that you had in one of the banks, do you remember that special account?

A. Yes, sir.

Q. What was that money used for?

A. Mr. Bryan had a bar on Hendricks Avenue, South Jacksonville, and I used to cash the shipyard workers checks when they came in there from work on Friday.

Q. Did you make any profit on that account?

A. Not that I know of.

Q. Where did you get the \$5,000 that you started paying on?

[fol. 314] A. I got it out of the box.

Q. When Mr. Bryan would buy property, where would you go to get the money?

A. Well, when I bought the cashier's check I got it from there. Until then, when he come home we would get the money.

Q. After then where did you keep it?

A. We kept it in the safety deposit box.

Q. Was that all money made during and before prohibition?

A. To the best of my knowledge.

Q. I mean, prior to the end of prohibition?

A. Yes, that's right.

Mr. Muskoff: You may inquire.

Cross-examination.

By Mr. Yerkes:

Q. Where were you living when you married Baker Bryan?

A. Jacksonville, Florida.

Q. How much money did you say he had?

A. In the neighborhood of \$180,000.00.

Q. Where did he have that?

A. Well, he kept it—we kept it at home. You asked me where did he have it—I don't know exactly what you mean. I don't know where he had it before I knew him.

Q. Where were you living in 1926?

A. Laura Street. I married Mr. Bryan in 1926.

Q. Where did you set up housekeeping with Mr. Bryan?

[fol. 315] A. On Laura Street.

Q. And you had the money there?

A. Yes, sir.

Q. How do you know how much it was?

A. Well, I helped him count it.

Q. How often would you count it?

A. Well, not very often.

Q. And you never deposited that money?

A. No, sir.

Q. And you never put it in a safety deposit box?

A. No, sir.

Q. What part of Laura Street were you on?

A. Almost at the very end and directly across from where I am living now.

Q. Right at the Trout River?

A. Yes, sir.

Q. Now, you say you put between One Hundred Fifty to One Hundred Sixty Thousand Dollars in the safety deposit box?

A. Yes, sir.

Q. What had become of the other \$30,000?

A. Well, Mr. Bryan was selling whiskey. He had used some of it and he buys property occasionally.

Q. What date was it that you put that money in the box, first?

A. I think it was in November, 1940.

Q. What were the denominations of that money?

A. I don't know that. Mr. Bryan kept the money wrapped in little packages and marked as such, whatever it amounted to in the package, and I couldn't tell you that.

[fol. 316] Q. What was the denomination of the \$40,000 that you took out?

A. It was a mixture; some large money and some small money. I don't remember just exactly what it was.

Q. Mr. Bryan didn't buy that check; did he?

A. No, I did.

Q. At the ladies' teller?

A. No, I got it at the cashier's window.

# Redirect examination.

By Mr. Muskoff:

Q. When you say you don't remember the size of the money, were there any One Dollar bills or small bills, or were they all larger than that?

A. Well, I hardly think that—he must have had some small bills, but I hardly think I would have gotten them out. I don't actually know. I just don't remember.

Q. How much education does Mr. Bryan have?

Mr. Yerkes: She stated she knew him from 1926 to this date.

The Court: I don't believe she told us how long she knew him.

Mr. Muskoff: I will change the question.

Q. From the general reputation of Mr. Bryan's family and Mr. Bryan's mother, how much education did he have?

[fol. 317] Mr. Yerkes: I don't think that is proper.

The Court: Objection sustained.

By the Court:

Q. If you knew Mr. Bryan all his life, you can tell us.

A. I have always understood that he didn't have very much of an education, but, of course,—

Q. How long have you known him?

A. Well, I knew of him about two years before I married him.

Q. And how old was he when you married him?

A. I think I will have to figure that back. Well, he is 63 now and I married him in 1926.

By Mr. Muskoff:

Q. How was Mr. Bryan's health?

A. He has had diabetes for a long time.

Q. Does he take insulin daily?

A. Yes, sir.

Q. Has he been under constant care for a number of years?

A. Yes, sir.

Mr. Muskoff: That's all.

(Wherenpon, the witness was excused.)

Mr. Muskoff: Defendant rests.

[fol. 318] Mr. Yerkes: Government rests.

Mr. Muskoff: We want to renew our motion.

(Counsel for the defendant, at the conclusion of the testimony, renews their motion for a judgment of acquittal on the indictment, and each count thereof, upon the same grounds as stated in the motion made at the conclusion of the Government's case, as follows: (1) That the evidence introduced by the Government is wholly insufficient and does not support the material allegations contained in each count, severally, of the indictment. (2) That the evidence introduced by the Government is not sufficient to support any issue of fact required for its admission to the Jury. (3) That the evidence introduced by the Government is insufficient and does not meet the requirements prescribed by law to support the charge set out in each count of the indictment, severally. (4) That the evidence introduced by the Government herein is just as consistent with the innocence of the defendant as it is with his guilt, and for that reason it does not meet the requirements prescribed by law. (5) That the evidence fails to show any wilful attempt on the part of the defendant to evade the tax alleged to have been evaded in each count of the indictment, severally. (6) That there is no proof by any witness on behalf of the Government that the defendant wilfully and knowingly attempted to defeat and evade a large part of the income tax due the Government. (7) That there is no adequate proof as to the net worth of the defendant on the 31st day of December, 1940. (8) That there is no presumption that the money spent by the defendant in the years involved is money which he acquired in those years. In other words, the defendant, during the years in question, may have spent money which he acquired in previous years and there is no proof or presumption to the contrary.)

The Court: The motion is denied.

(Whereupon, after the conclusion of the testimony and each party had rested, the Court held a conference with counsel for the Government and counsel for the Defendant, in chambers, at which conference the Court advised counsel for the Defendant that it would in its own language give in substance all the pertinent charges requested by counsel for defendant appearing in the record



Case No. 11980, Joe H. Jones vs. United States of America, United States Circuit Court of Appeals, Fifth Circuit.)

(Whereupon, Court reconvened, at which time the case was argued to the Jury by counsel for the United States and counsel for the defendant, the following proceedings were had:)

The Court: Gentlemen of the Jury, this case has now been completed insofar as the evidence is concerned and the only thing that remains to be done is for me to charge you as to the law covering this case and for you to consider it and render your verdict. You will not discuss this case [fol. 320] with one another, or permit anyone else to discuss it with you. We will take a recess until 10 o'clock tomorrow morning.

(Whereupon, on Friday, July 9, 1948, at 10 o'clock in the forenoon, Court reconvened and the following proceedings were had:)

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(CHARGE OF THE COURT)

"Gentlemen of the Jury: The Grand Jury has returned into this Court an indictment in four counts against the defendant, J. Baker Bryan, Sr. Each count of this indictment charges an offense of the same nature; that is, each count charges that the defendant during each calendar year 1941, 1942, 1943 and 1944 did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America by filing a false and fraudulent income tax return for each of said calendar years, showing a net income in a sum substantially less than the amount of his net income for each of said years.

"To this indictment this defendant entered a plea of not guilty, which makes up the issue you are to try; the Government by the indictment returned by the Grand Jury charging the accused and the defendant by his plea of not guilty denying every material allegation of the indictment.

"Notwithstanding this indictment, this defendant, as do all defendants in criminal cases in this Court, comes into [fol. 321] this Court clothed with the presumption of innocence, which presumption of innocence remains and abides with him throughout the trial, unless and until the Govern-

ment has by competent evidence convinced the mind of each individual juror of the guilt of the accused beyond a reasonable doubt.

"A reasonable doubt, Gentlemen, means just exactly what the term implies; a doubt that would appeal to a reasonable man; a doubt for which you can give yourself a reason. It does not mean an idle, whimsical, or fanciful doubt, but a real, well-founded doubt.

"As all of you gentlemen know, the United States Government has imposed an income tax upon most of us. The law imposing this tax places upon each individual and citizen subject to the law the duty of making a tax return for either a calendar or fiscal year as elected by the taxpayer of the gross and net income received by the taxpayer during said period. The law imposes penalties upon a taxpayer who is negligent in certain particulars in the preparation and filing of his return. Then the law goes further and provides that any taxpayer who wilfully and knowingly attempts to defeat and evade any part of the income tax due and owing by him to the United States by filing a false and fraudulent income tax return, wherein he states his net income to be less than that actually received by him for the period in question shall be guilty of a felony and punished accordingly.

"This defendant is on trial here for a violation of this latter provision of the income tax law.

"The return of the indictment by the Grand Jury against the defendant in this case is no evidence of the defendant's [fol. 322] guilt. As I have already charged you, the presumption of innocence remains and abides with the defendant throughout the trial, unless and until the Government has, by competent evidence, convinced the mind of each individual juror of the guilt of the defendant beyond a reasonable doubt.

"The indictment is a pleading by which the issues are stated in order to get the case in Court to determine these issues. I, therefore, charge you in this case that you are not to consider the indictment as any evidence, whatever, of defendant's guilt and you are not to allow yourselves to be influenced by reason that such indictment has been returned by the Grand Jury, but you will consider only the sworn testimony admitted in evidence before you by the Court.

"I further charge you that the filing of an incorrect income tax return by a taxpayer is not in itself a violation of the law. It becomes a violation of the law only when wilfully filed, knowing it to be incorrect, and filed with the intent to evade and defeat the lawful tax due by the taxpayer. In this connection I desire to charge you with reference to certain words used in the statute touching the question of guilt or innocence of the defendant.

"The word 'wilful' as used in the statute means that an act or omission, to be wilful, must be knowingly done with the specific purpose of evil or wrongdoing. Wilfulness is an intent with bad purpose.

"I further charge you that 'fraud' or 'fraudulent' as used in the statute means actual, intentional wrongdoing [fol. 323] and the intent required is the specific purpose to evade the tax believed to be owing. Mere negligence, whether slight or gross, on the part of the taxpayer, is not the equivalent of a wilful intent.

"The indictment in this case also charges an 'attempt' on the part of the defendant to evade a large part of the income tax due and owing by him. I charge you that the word 'attempt' as used in the indictment means an affirmative overt act on the part of the defendant tending to show the design and purpose of wrongdoing.

"In order to find the defendant guilty of the offense charged in each or any of the four counts of the indictment, you must find that three things co-exist, namely: (1) an omission of income in the return. (2) the income was knowingly and wilfully omitted; and (3) an intent to evade the tax by such omission.

"Unless you find and believe from the evidence beyond a reasonable doubt that the defendant, J. Baker Bryan, Sr., for the years 1941, 1942, 1943 and 1944, or for any of these years, in his income tax return knowingly and wilfully omitted part of his income and that he did so with an intent to evade or defeat the tax due thereon, or if you have a reasonable doubt about this, it will be your duty to acquit the defendant.

"Now, Gentlemen, I have referred frequently to the matter of 'intent' of the taxpayer being an essential element of this offense. I therefore also desire to charge you as to the law of intent. Intent is something that exists in a [fol. 324] man's mind. It is impossible for you to enter into



the mind of the defendant to determine the intent with which he acts. Therefore, his intent has to be judged at least by his intelligence as shown by the evidence; by his experience in life as shown by the evidence; and, generally, by judging him as reasonable prudent men experienced in the every-day affairs of life judge each other, and it is the law that a person intends the usual and probable consequences of his act.

"Now, Gentlemen, I shall charge you presently that you, as jurors, are the sole judges of the evidence in this case. However, the law permits the Court to comment upon the evidence to a jury with the admonition to the jury that what the Judge says as to what the evidence might or might not be is not controlling upon them for the reason that you are the sole judges of the evidence. However, I find it frequently aids the jury for the Court to analyze the evidence, pointing out that which is material and that which is not of equal materiality and I shall do this in this case in the hope that it will aid you in your deliberations.

"The Government does not challenge the correctness of any item in the returns filed by the defendant for the years in question. The charge is that defendant did not make a full, complete and true disclosure of all income received by him during the years in question. The evidence shows that defendant had not set up or installed an adequate accounting system showing his complete business operations. The law does not require any taxpayer to keep adequate accounts and many taxpayers do not [fol. 325] do so. The failure to keep such accounts, however, forces the tax collector to resort to the method followed in this case to test the accuracy of a taxpayer's return. This method has been constantly referred to throughout the trial of this case as the 'capital gains' method. That is, the collector determines the taxpayer's assets at the beginning and at the end of the tax period, and, after making appropriate deductions and additions, attempts to determine whether an honest return has been made and filed by the taxpayer.

"The indictment in each count in this case, after setting out the return made and filed by defendant for each year in question, claimed a net income greatly in excess of the amount returned by defendant and in each count stated



the amount of net income and the amount of tax claimed to be due thereon. Two days of the trial of this case were consumed by the Government in submitting evidence in support of the claimed income set out in each count of the indictment. As to Counts 1 and 4, the evidence fell short of the amounts claimed, due to objections sustained as to evidence offered in support of certain items. As to Counts 2 and 3, the evidence disclosed capital gains in excess of the amounts claimed.

"What I desire to make clear to you, Gentlemen of the Jury, is that the law controlling you in this case makes neither the amounts claimed nor the amounts proven by the evidence an essential ingredient of the offense charged. As heretofore stated, the offense charged is that defendant did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the [fol. 326] United States by filing a false and fraudulent income tax return wherein he stated a net income less than the Government claims he earned in each of the years in question.

"It matters not whether defendant's net income was 'X' Dollars or 'Y' Dollars in excess of the amount returned by him for each of the calendar years in question, but whether he wilfully and knowingly attempted to defeat and evade a part of the income tax due and owing by him by making a false and fraudulent return, wherein he stated his net income to be substantially less than it actually was. So, Gentlemen of the Jury, you will not concern yourselves with whether the evidence upon any particular item satisfies you as to whether said item constitutes a capital gain accrued out of earnings of defendant during the years, or any of the years, in question; but only whether the evidence as a whole shows that returns filed by the defendant were incorrect and whether defendant, in filing said returns, did so wilfully and knowingly in an attempt to evade and defeat a large part of the income tax due and owing by him.

"The defendant submitted no evidence controverting the testimony offered by the Government as to the claimed capital gains for any of the years in question. But his failure to do so does not mean defendant admits the accuracy of the Government's proof as to his capital gains for any of the years in question. He defends the Govern-

ment's claim as to capital gains upon other grounds. He offered testimony to the effect that on January 1, 1941 he had cash on hand not taken into account by the Government, [fol. 327] which was in excess of the total capital gains claimed by the Government during the years in question and that these capital gains were purchased with this cash. If you believe this testimony to be true or if it creates in your mind a reasonable doubt as to whether the capital gains for the years in question were derived from earnings in those years or from the cash defendant possessed prior to January 1, 1941, it will be your duty to acquit the defendant.

"If you do not believe this testimony, but believe the capital gains, or any substantial part thereof, represents income earned during the years in question, or any of them, and that such capital gains were not reported, or such income was not reported by the defendant, it will be your duty then to determine whether the defendant wilfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him by filing a false and fraudulent income tax return.

"I have made this extended comment upon the evidence and the law in the hope that it might be of help to you in coming quickly to the real question you have to determine. Let me summarize it this way: In this case you do not have before you the question of the amount of income tax, if any, due by defendant; but solely the question of whether this defendant wilfully and knowingly attempted to defeat and evade a large part of the income tax due and owing by him by filing a false and fraudulent income tax return.

"Gentlemen, you have here the evidence in this case upon this question and you are the sole judges of this evidence, its weight and sufficiency, and the credibility of [fol. 328] the witnesses. It is your duty to seek to reconcile the testimony of the witnesses so as to make each witness speak the truth; but, if after a full and fair consideration of all the testimony you find an irreconcilable conflict in the testimony then you must determine what testimony is true and reject such testimony as you disbelieve, and from the testimony you believe find your verdict.

"In passing upon the credibility of a witness it is proper that you take into consideration the manner of the wit-

ness on the witness stand; his candor or want of candor; his intelligence, or otherwise; the reasonableness or unreasonableness of his statement; his interest, if any he has; and all the circumstances surrounding such witness at the time of the giving of his testimony and at the time of the happening of the events testified about.

“Now, Gentlemen, in this case the defendant has not taken the stand, and as to this failure the Court charges you that while the statute of this State permits the defendant to testify he is under no obligation to do so; and his failure to do so creates no presumption against him; and you are not authorized to draw any distinction from or make any reference to the failure of the defendant to testify, for with his silence you have nothing to do. You will decide this case with reference alone to the testimony actually introduced without regard to what might not or might have been found out had the defendant testified.

“Now, Gentlemen, with the consequences of your verdict you have absolutely nothing to do. As to what may be the result of your verdict is entirely beyond your province. All that you are empanelled and sworn to do in this case is to find a verdict which speaks the truth. You are to lay aside any preconceived idea that you may have as to the wisdom or unwisdom of the particular statute under which this defendant is being tried, or any predilection that you might have toward one side or the other in this case and consider the testimony carefully and deliberately and then return a verdict which you believe speaks the truth. After you have discharged your duties in that respect you have done everything that the law imposes upon you.

“Gentlemen, at the outset of this case I called your attention to the fact that there are four counts in this indictment. You may find this defendant guilty upon all or upon any one of those counts, stating in your verdict, in case it is a verdict of guilty, the counts upon which you find him guilty. It will then not be necessary to return a verdict of not guilty upon the other counts, for the reason that the failure to include in your verdict of guilty those counts will operate as an acquittal upon the other counts.

“In case you should find the defendant guilty, the form of your verdict will be: ‘We, the Jury, find the defendant

(naming him) guilty as charged in counts (setting them out in your verdict as to the number or numbers in the indictment). So say we all'; and let some member sign as foreman. In case you find the defendant not guilty upon all the counts in the indictment, the form of your verdict will be: 'We, the Jury, find the defendant not [fol. 330] guilty as charged in the indictment. So say we all'; and let some member sign as foreman.

"Gentlemen, I have prepared form verdicts for you in this case, one of 'guilty' and one of 'not guilty', and all that it will be necessary for you to do is to have some member sign it as foreman; and in case of a verdict of guilty, should you return such a verdict, to set out the counts upon which you find the defendant guilty.

"May I suggest that when you retire to consider your verdict that you promptly at that time select some person to act as foreman so that you may enter upon an orderly deliberation in this case.

"You will take the indictment, these forms of verdicts that I have given you, the exhibits that have been introduced, and you will retire and consider your verdict."

The Court: Gentlemen, is there anything that I have overlooked that either of you desire to call to my attention?

Mr. Yerkes: No, there is not, and I have no objection or request. There is one little part of the charge which is confusing to me; I may not have heard it right; when you stated that the first and fourth counts had not been shown to be the amounts alleged in the indictment,

[fol. 331] The Court: The amounts shown by the evidence touching the first and fourth counts fell a little short of the amounts alleged in the indictment.

Mr. Yerkes: I would like to have it explained to the Jury that even though it was short of the amount alleged in the indictment, it was a substantial amount.

The Court: I stated it didn't matter whether it was 'X' Dollars or 'Y' Dollars, or what it was.

(There being no request or comment by counsel for the defendant, the Court proceeded, as follows:)

"You may retire, Gentlemen, and consider your verdict."

(Whereupon, the Jury retired from open court.)



(After deliberating for approximately an hour, the Jury returned to open court, and the following proceedings were had:)

The Court: I understand that you Gentlemen came back with a request that I give you some information; is that correct?

Foreman of the Jury: Yes, Sir.

[fol. 332] The Court: What is it you would like to know?

Foreman of the Jury: One question is of your definition of "Intent".

The Court: I Charged you that "intent" is a material element of the offense charged in this indictment, which intent must be proven beyond a reasonable doubt before you can convict. Intent is something that exists in a man's mind. It is impossible for you to enter the mind of the defendant to determine the intent with which he acted. Therefore, his intent has to be judged at least by his intelligence as shown by the evidence; by his experience in life, as shown by the evidence; and, generally, by judging him as reasonable, prudent men, experienced in the everyday affairs of life judge each other; and it is the law that a person intends the usual and probable consequences of his act. Is there anything further?

Foreman of the Jury: There is one place in your charge where you mentioned three questions that would be in our minds.

The Court: What you would have to find in order to convict the defendant?

Foreman of the Jury: Yes, Sir.

[fol. 333] The Court: The indictment in this case charges an attempt on the part of the defendant to defeat and evade a large part of the income tax due and owing by him. In order to find the defendant guilty of the offense charged in each of the four counts of the indictment you must find that three things exist; namely, (1) an omission of income in the return; (2) the income was knowingly and wilfully omitted; and (3) an intent to evade the tax by such omission. Is there anything further?

Foreman of the Jury: I don't think so.

The Court: You may retire and again resume your deliberations.

(Whereupon, the Jury retired from open court.)

(Whereupon, at 12:35 P. M. the following proceedings were had, not in the presence of the Jury:)

The Court: Mr. Muskoff, it is now 12:35 and the question that I have in mind is whether or not we might let the jury go get something to eat and come back; or, whether you would like to hold them together without anything to eat for a little while longer.

Mr. Muskoff: It is immaterial to me.

[fol. 334] The Court: I can send the marshal around to ascertain whether they can arrive at a verdict in a very few minutes, and, if not, I will let them go get their lunch.

Mr. Muskoff: That is agreeable to me.

Mr. Yerkes: Yes, that is all right.

(Whereupon, the Jury returned to open court and the following proceedings were had:)

The Court: Do you gentlemen feel you can arrive at a verdict at any time soon?

Foreman of the Jury: The Jury is unable to arrive at a verdict.

The Court: You have been unable to arrive at a verdict?

Foreman of the Jury: Yes, Sir.

The Court: I am not going to declare a mistrial and discharge you from consideration of this case at this time. Before I sent the marshal around to your chambers to inquire if you were near ready to report, counsel for the Government [fol. 335] and counsel for the defendant agreed that I might call you in here and let you go get some lunch and come back after lunch and renew your deliberations. Now, Gentlemen, when you return at two o'clock you return to the jury room. You will not need to come back in here, but you may return directly to the jury room. The marshal will let you in when you get back at two o'clock and you resume your deliberations and the Court will be here to await your later announcement. Since I am not going to have you report back into Court before you return to the jury room to consider your verdict, I desire to give you one further instruction which the law authorizes me to give at this stage of the jury's deliberations: "The Jury is instructed that in a large portion of cases absolute certainty cannot be expected, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows. You are to examine the questions submitted with candor and with the proper

regard and deference of the opinions of each other. It is your duty to decide this case, if you can conscientiously do so. No juror is expected to do violence to his conscience. You should listen with a disposition to be convinced to each other's arguments. If a much larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one, which made no impression upon the minds of so many men equally honest and equally intelligent as himself. If, on the other hand, the majority of you are for acquittal, the minority ought to ask themselves whether they may not reasonably doubt the correctness of a judgment which was not concurred in by the majority." Now, Gentlemen, as I stated, as soon as the [fol. 336] Court recesses you may disburse and go get your lunch and return at 2 o'clock, when the marshal will let you into your jury room and you will resume your deliberations in this case.

(Whereupon, the jury retired from open court.)

Certificate of Court Reporter (Omitted).

[fol. 337] JUDGMENT—Filed July 9, 1948

[Caption omitted]

In the above entitled cause a Verdict of Guilty having been returned as to Counts 3 and 4 only,

It is ordered that the Defendant J. Baker Bryan, Sr., be discharged and allowed to go hence without day for his return, as to Counts 1 and 2.

Done and ordered at Jacksonville, Florida, this 9th day of July, A. D. 1948.

(S.) Dozier A. DeVane, United States District Judge.

## JUDGMENT AND COMMITMENT—Filed July 9, 1948

Cr. Form No. 25

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN  
DISTRICT OF FLORIDA, JACKSONVILLE DIVISION

No. 7734-J-Criminal

UNITED STATES OF AMERICA

vs.

J. BAKER BRYAN, SR., Jacksonville, Fla.

Edwin R. Williams, Clerk

On this 9th day of July, 1948 came the attorney for the government and the defendant appeared in person and [fol. 338] by counsel, John Musköff and Alston Cockrell, and the defendant having been furnished with a copy of the Indictment pending against him.

It is adjudged that the defendant has been convicted upon his plea of Not Guilty, and a verdict of guilty on counts 3 and 4, of the offense of filing and causing to be filed false and fraudulent Income Tax Returns in violation of Title 26, U. S. C., Section 145(b), as charged in counts 3 and 4 of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years on count 3 of the Indictment herein, or until he is otherwise discharged as provided by law.

It is further adjudged that the United States of America do have and recover of and from the defendant the sum of Ten Thousand Dollars (\$10,000.00) as a fine imposed on count 4 of the Indictment herein, for which let execution issue.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-



[fol. 339] shal or other qualified officer and that the copy serve as the commitment of the defendant.

(S.) Dozier A. DeVane, United States District Judge.

STATEMENT OF POINTS ON APPEAL—Filed Aug. 9, 1948

(Caption omitted.)

1

The error of the Court in denying defendant's motion for acquittal made at the conclusion of the government's evidence.

2

The error of the Court in denying defendant's motion for acquittal made at the conclusion of all the evidence.

3

The error of the Court in discharging one of the members of the jury and continuing the trial with only eleven on the jury there being no stipulation in writing that the jury should consist of less than twelve, the defendant himself not having consented thereto, the only consent thereto [fol. 340] being the oral agreement of government's and defendant's attorneys.

4

The error of the Court in permitting in evidence the audit purportedly made by the government witness, E. J. Marquis, Jr., Government's Exhibit 38.

5

The error of the Court in permitting the government to introduce evidence as to the expenditures of Evelyn Bryan.

6

The error of the Court in ruling in the presence of the jury as follows: "He has regulations in doing it. Under the Internal Revenue regulations it is classified as a capital asset. If they are wrong in their classifications you and I will have to get them to correct it."

7

The error of the Court in permitting the Government attorney to berate the defendant in his argument before the jury for not making disclosures to the Government agents.

8

The indictment does not state facts sufficient to constitute and offense against the United States.

[fol. 341]

9

The error of the Court in denying the defendant's motion for a better bill of particulars, filed on to wit the 13th day of March, 1948.

10

The error of the Court in not granting defendant's motion to dismiss the indictment.

(S.) John W. Muskoff, 1105 Graham Building, Jacksonville, Florida; Alston Cockrell, 1105 Graham Building, Jacksonville, Florida, Attorneys for defendant.

Copy of the above received on this the 9th day of August A. D. 1948.

(S.) Arthur A. Simpson, Asst. U. S. District Attorney.

[fol. 342] APPELLANT'S DIRECTIONS FOR CONTENTS OF RECORD ON APPEAL—Filed Aug. 9, 1948

[Caption omitted]

In preparing the transcript of record for the United States Circuit Court of Appeals for the Fifth Circuit in this cause the Clerk of this Court will please include the following:

1. The indictment.
2. A statement as to the arraignment and plea of the defendant.
3. Defendant's motion for bill of particulars filed December 23, 1947.
4. Defendant's motion for leave to withdraw plea filed February 24, 1948.

5. Order on motion for bill of particulars recorded March 5, 1948.

6. Bill of particulars filed March 8, 1948.

7. Motion for better bill of particulars filed March 10, 1948.

8. Order granting motion for better bill of particulars granted March 10, 1948.

[fol. 343] 9. Bill of particulars filed March 12, 1948.

10. Motion for better bill of particulars filed March 13, 1948.

11. Motion to dismiss filed March 13, 1948.

12. Order denying motion for better bill of particulars as indicated in the transcript of testimony and record, page 3.

13. Motion for acquittal and/or new trial filed July 14, 1948.

14. Motion for arrest of judgment filed July 14, 1948.

15. Order denying motion for acquittal and motion in arrest of judgment filed July 15, 1948.

16. Notice of appeal filed July 15, 1948.

17. Motion for supersedeas bond filed July 15, 1948.

18. Order granting stay of judgment and execution dated July 15, 1948.

19. The Clerk's minutes of the trial.

20. The Court Reporter's transcript of the trial.

21. All exhibits introduced at the trial.

22. Copy of sentence and judgment.

[fol. 344] (S.) John W. Muskoff, 1105 Graham Building, Jacksonville, Florida; Alston Cockrell, 1105 Graham Building, Jacksonville, Florida, Attorneys for Defendant.

Copy of the above received on this the 9th day of August, A. D. 1948.

(S.) Arthur A. Simpson, Asst. U. S. District Attorney.

APPELLANT'S AMENDED DIRECTIONS FOR CONTENTS OF RECORD  
ON APPEAL—Filed Aug. 13, 1948

[Caption omitted]

In preparing the transcript of record for the United States Circuit Court of Appeals for the Fifth Circuit in

[fol. 345] this cause the Clerk of this Court will please delete Item 21, the government having consented to send the originals.

(S.) John W. Muskoff, 1105 Graham Building, Jacksonville, Florida; Alston Cockrell, 1105 Graham Building, Jacksonville, Florida, Attorneys for Defendant.

Edwin R. Williams, Clerk, Jacksonville, Fla.

Received copy of the above this the 13th day of August, A. D. 1948.

(S.) Arthur A. Simpson.

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STIPULATION WITH REFERENCE TO EXHIBITS—Filed August 16, 1948

[Caption omitted]

It is hereby agreed and stipulated by and between the defendant, J. Baker Bryan, Sr., and his attorneys, Alston Cockrell and John W. Muskoff, and the attorneys for the government that all of the exhibits introduced in evidence [fol. 346] by the government be sent to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

It is further agreed and stipulated that the exhibits as now contained in the files of the Court or substituted certified or photostatic copies may be sent in lieu of the original exhibits.

The purpose of this stipulation is to shorten the record and make the exhibits available to the Circuit Court in the event they wish to inspect them.

(S.) Damon G. Yerkes, Assistant United States Attorney for the Southern District of Florida; (S.) John W. Muskoff, Attorney for Defendant, 1105 Graham Building, Jacksonville, Florida; (S.) Alston Cockrell, Attorney for Defendant, 1105 Graham Building, Jacksonville, Florida.



[fol. 347] ORDER—Filed August 16, 1948

[Caption omitted]

It is hereby ordered that the Clerk of this Court send to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, all of the exhibits introduced in evidence by the government in the trial of this cause in accordance with stipulation entered into by and between the parties.

This 14th day of August, 1948.

(S.) William J. Barker, United States District Judge.  
Edwin R. Williams, Clerk, Jacksonville, Fla.

[fol. 348] Clerk's certificate omitted.



[fol. 349] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 21st, 1949

No. 12456

J. BAKER BRYAN, SR.,

versus

UNITED STATES OF AMERICA

On this day this cause was called, and, after argument by Alston Cockrell, Esq., and C. J. Batter, Esq., for appellant, and Damon G. Yerkes, Esq., Assistant United States Attorney, for appellee, was submitted to the Court.

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[fol. 350] OPINION OF THE COURT AND DISSENTING OPINION  
BY McCORD, CIRCUIT JUDGE—Filed May 13, 1949

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT

No. 12456

J. BAKER BRYAN, SR., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the  
Southern District of Florida

(May 13, 1949)

Before Sibley, McCord, and Waller, Circuit Judges

WALLER, Circuit Judge:

Count 1 of the indictment alleged that in 1941 Appellant willfully and knowingly attempted to defeat and evade a part of his income tax by filing with the Collector of Inter-

nal Revenue at Jacksonville, Florida, a false and fraudulent income tax return. Counts 2, 3, and 4 charged him with having committed the same offense in each of the years 1942, [fol. 351] 1943, and 1944, respectively. The jury acquitted on Counts 1 and 2 but convicted on Counts 3 and 4. Two bills of particulars filed by the United States Attorney limit the alleged evasions to understatements of the gross receipts derived from the business operated by Appellant in each of the years.<sup>1</sup> No claim is made that the deductions from

<sup>1</sup> The following are excerpts from the bills of particulars:

"Answering Paragraph a of the motion for bill of particulars, as required in said order, the United States says that 'No deductions are claimed to be false, however, the depreciation claimed for the year 1941 was reduced due to technical adjustments.'

"Answering Paragraph b of the motion for bill of particulars, as required in said order, the United States says that 'None claimed to be false.' [Paragraph b of the motion related to deductions.]

"Answering Paragraph c of the motion for bill of particulars, as required in said order, the United States says 'The gross income for each of the years covered by the indictment is understated.'

"Answering Paragraph d of the motion for bill of particulars, as required in said order, the United States says 'The gross income from business and gambling is understated.'

"Answering Paragraph e of the motion for bill of particulars, as required in said order, the United States says 'No income is claimed to have been received from any sources other than those shown on the returns filed.'

"And finally, answering Paragraph f of the motion for bill of particulars as required in said order, the United States says 'None alleged to have been received from sources other than those shown in the returns filed.' " [R. 10-11.]

"The business gross receipts are alleged to be understated in the amount of not less than \$9,036.81 for the year 1941.

"The business gross receipts are alleged to be understated in the amount of not less than \$11,038.39 for the year 1942;



the income tax returns of the Appellant were unallowable, fictitious, or false. Measured, as the proof must be, by these bills of particulars, the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question. No witness gave any direct testimony as to any specific instances of failing or refusing to account for gross business income. Such records as were kept by Defendant make [fol. 352] no such revelations. No evidence was produced from any books or records of the Defendant showing gross income in excess of that reported. No proof has been produced of duplicity in keeping more than one set of books. The Government attempted to show, and did show, by the testimony of approximately fifty witnesses and by documentary proof, expenditures in each of the years of sums greatly in excess of the gross income reported for each year. For instance, in the year 1943, Appellant reported as gross income the sum of \$271,980.27, whereas his gross expenditures for the year were \$293,251.45. The Government insists that the Defendant's net worth during that year was increased by expenditures made in excess of reported gross income to the point that his net income was \$23,615.95 rather than the \$1,814.67 reported. In the year 1944 the gross income of the Defendant was reported at \$154,911.40. The Government proved that his total expenditures during the year in question was \$229,021.40, and after making certain allowances and deductions, it insists that his net income was understated for that year in the sum of \$81,919.84.

The evidence is clear that Defendant spent considerably more money during these years than his reported gross incomes. It also was demonstrated that his capital assets were increased each year in proportion to expenditures in excess of gross receipts, but Defendant contends that the evidence wholly fails to show that the expenditures in excess of reported gross income came out of current receipts and not out of available assets acquired in prior years.

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"The business gross receipts are alleged to be understated in the amount of not less than \$21,468.95 for the year 1943; and

"The business gross receipts are alleged to be understated in the amount of not less than \$81,507.41 for the year 1944."

[R. 14.]

[fol 353] The difficulty in the case lies in determining whether or not the net assets of the Defendant owned at the beginning of the period in question and still held at the dates of the alleged violations were accurately ascertained and definitely established by the auditor for the Bureau of Internal Revenue.

There were available to the auditor no financial statements, no books of Defendant showing assets and liabilities, and no admissions by the Defendant that could be used as an admitted, or definite, point of beginning by which to determine income by the "net worth and expenditure basis"<sup>2</sup> as was attempted in this case. In the absence of an admitted or definite statement that bound or tended to bind the Defendant as to his net worth on January 1, 1941, the auditor for the Bureau undertook to compute such net worth from the record of conveyances, bills of sale, mortgages, bank deposits, income tax returns, and such other information as he could find and which he considered reliable. After resorting to all known and available sources of information, the auditor computed the Defendant's net worth as of January 1, 1941, at \$107,108.00. This figure was based chiefly on the cost of real estate, furniture, and fixtures in the night clubs and gambling places of the Defendant, and included only \$40.70 cash in the bank. The auditor was unable to find where the Defendant had kept any bank account prior to 1940. Defendant, who was engaged in operating night clubs, gambling spots, and bars, during the years involved, had been a purveyor of illicit liquor in the prohibition era, according to the testimony of

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<sup>2</sup> The auditor stated:

"A net worth basis is simply an increase in net worth from one year to the next year. By net worth from all capital items and expenditures that we recorded here we show where the increase in net worth came from. That is where that net worth and expenditure basis comes into the picture. Establishing a net worth at the opening of the period and establishing a net worth at the close of the period, and the increase in net worth is the figure we have in the audit after each year under investigation. Those increases in net worth are substantiated by the expenditure basis of either cash or checks that we have involved." [R. 271.]

his wife had amassed, and secreted, in a safe in a closet of his home, considerable wealth.

The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate.<sup>3</sup>

[fol. 355] Since the bill of particulars in this case admits that no claim of evasion is based upon the deductions from gross income reported by the Defendant, and since there is no evidence that the gross expenditures by the Defendant

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<sup>3</sup> In U. S. v. Chapman, 168 F. 2d 997 (7 Cir.), we find the following statement:

“Appellant contends that, ‘In a “net worth case,” the starting point must be based upon a solid foundation and a Revenue Agent’s statement of the defendant’s oral admission or confession when uncorroborated is not sufficient to convict.’ We fully agree with this statement of the law. However we find no deviation from it in this case. The actual starting point here was the net worth as established by appellant’s books and records. From these Lloyd drew up a statement of appellant’s assets and liabilities as of January 1, and December 31, 1942.”

In the case of U. S. v. Skidmore, 123 F. 2d 604, the net worth-expenditure basis was used in the prosecution of the defendant for income tax evasion, but in addition to the calculation of the Revenue Agents as to his assets it was shown that the defendant had made certain admissions to the Government Agents as to his net worth and it is apparent in that case that the conviction would not have been sustained if the computation made by agents was unsubstantiated by any admissions or records of the defendant and if the agent had admitted that he did not know whether the defendant had other assets or not.

In James Q. Whittemore, Tax Court Docket No. 13421, dated November 16, 1948, Judge Arundell, speaking for The Tax Court, said:

“But there is another reason of equal importance that throws discredit on respondent’s method and that is his failure to determine with any degree of accuracy

in any year were made entirely from gross income of the business operations in such year, it was essential for the Government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived. If the Defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the Defendant or included by the Government's computation of net worth. During the years 1943 and 1944—covered by Counts 3 and 4 on which Defendant was convicted—the Defendant's expenditures exceeded the gross income of his business by approximately \$100,000.00. Obviously, therefore, Defendant either falsely stated his gross receipts or had available to his use assets not revealed by the auditor's computation of his net worth at the beginning of the period involved.

The Defendant did not take the stand, but his wife did, and testified that when she married the Defendant in 1926 he was a bootlegger possessed of approximately \$180,000.00, the residue of which was kept in a safe in a closet in their home until November 4, 1940, when she rented a lock box at the Florida National Bank in Jacksonville wherein she put between \$150,000.00 and \$160,000.00 in cash. She further testified that she paid one of the large expenditures of \$40,000.00 involved here by taking that much cash from the [fol. 356] lock box, depositing it in the bank, and giving a check thereon—all on the same day. The records of the bank show that the lock box was opened by her on the date of the \$40,000.00 check and tend to corroborate her to that extent. She also testified that she withdrew money as needed from the lock box. Thus Defendant undertook to account for the difference between the amount of his expenditures in excess of the amount of his current gross income during the period, as well as their source. Obvi-

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petitioner's net worth at the starting date of December 31, 1941. It would be absolutely necessary to know the amount of petitioner's net worth at the beginning of the taxable period before one could determine under a net worth basis a taxpayer's income for succeeding years."



ously—and seemingly with good right—the jury did not believe the wife's testimony.

But we cannot escape the fact that Mr. Marquis, the auditor, frankly admitted that he did not know whether his computation contained all the assets of the Defendant or not. The substance of his statement was that it contained all the assets which he, an auditor of much experience, could find.

The auditor gave the following testimony:

“By the Court:

Q. If you overlooked any assets that this defendant had, in your calculations, then your calculations would be in error, or subject to revision?

A. Yes, sir.” [R. 289.]

“Q. And you don't mean to say that he had no money whatsoever other than what is shown on that bank account, shown on January 1, 1941?

A. I didn't say that.

Q. Doesn't your audit assume that?

A. That is all the money we could account for.” [R. 296.]

[fol. 357] “Q. And you took into consideration only recorded purchases that you could find?

A. That was all I could.

Q. That was all you could?

A. Yes.

Q. During the course of examining Mr. Bryan, did you inquire into the cash sales that he made prior to that time?

A. No.

Q. Did the Department, or someone in your presence in one of the Government Departments, make inquiry into that?

A. I would not know.” [R. 300.]

“Q. Yet up until that time you had never found a bank account, up until 1940, that Mr. Bryan had?

A. No.

Q. And yet you assume that the only monies he had were in the bank on the first day of January, 1941?

A. That is all we took into account.

Q. You don't know whether he had a lot of other money, or not?

A. No, sir." [R. 302-303.]

These admissions are serious in this case because the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the Defendant took in from the operation of his night clubs and gambling enterprises. The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the Defendant. The jury no doubt [fol. 358] disbelieved, and had the right to disbelieve, Mrs. Bryan's testimony, but in view of the auditor's admissions that he was not able to say that his computation included all of the assets of the Defendant at the beginning of the period, together with the absence of any admissions, records, financial statements, bookkeeping entries, or other findings, or evidence, tending to bind the Defendant as to the lack of additional assets at the beginning of the tax period, the evidence, in the light of the bill of particulars, was insufficient to make out a *prima facie* case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.

In view of the foregoing conclusions it is unnecessary for us to pass upon the other specifications of error.

The judgment of the lower Court is reversed and the cause remanded for a new trial.

Reversed and Remanded.

McCord, Circuit Judge, dissenting:

The overwhelming weight of the evidence in this case points unerringly to the guilt of this defendant, and his conviction should be sustained. The majority decision is just another illustration of how rigid adherence to the [fol. 359] dangerous yoke of so-called authority and case precedent, rather than to right and reason under the evi-

dence can permit technical requirements of proof to feast and fill and fatten on justice.

The majority predicate their reversal on the sole ground that the evidence was insufficient to make out a *prima facie* case against the defendant on a net worth expenditure basis, for the reason that the testimony of the government auditor did not expressly exclude the hypothesis that some of the large expenditures by defendant "*might have been* from sources other than current business income." This is sheer speculation and conjecture, and an unwarranted presumption in favor of defendant's innocence after he has been fairly tried and convicted. Moreover, it is an unreasonable hypothesis which has already been rejected by the jury as manifestly incredible and unworthy of belief. The ultimate effect of the decision is to shackle the government to a practically insurmountable burden of proof in net worth-expenditure cases concerning matters which are peculiarly within only an evading defendant's knowledge.

In all cases, such as here, where a defendant has either destroyed his records, or they are otherwise unavailable, the government must of necessity resort to other indirect methods of proving unreported income, such as (1) by an analysis of the defendant's bank deposits; (2) by showing an increase in net worth on the net worth-expenditure basis; or (3) by evidence of purchases, expenditures and investments made during the tax years on which the prosecution is based. Many tax offenders of the worst type would go [fol. 360] unwhipped of justice if the government were not allowed to establish unreported taxable income by this type of circumstantial evidence. Each of the above methods is predicated upon the sound legal proposition that evidence of a large amount of unexplained funds or property in the hands of a defendant during the tax years under scrutiny establishes a *prima facie* case of understatement of income during that period. *U. S. v. Johnson*, 319 U. S. 503, 517, 519; *O'Brien v. U. S.*, 51 F. 2d 193; *U. S. v. Miro*, 60 F. 2d 58. It is then incumbent upon the defendant to go forward and offer proof in explanation of this unreported excess income, much in the same manner as would be required under the "possession of recently stolen goods" rule. *Yielding v. U. S.*, 173 F. 2d 46, 48; *Janow v. U. S.*, 141 F. 2d 1017; *Levi v. U. S.*, 71 F. 2d 353. It would be manifestly unreasonable to require the Government to give such a defendant a bill of particulars on his own hidden and unreported income,

or to offer proof to exclude the possibility that such other secret income does not in fact exist. *U. S. v. Kushner*, 135 F. 2d 668, 673; *U. S. v. Skidmore*, 123 F. 2d 604, 607; *Tinkoff v. U. S.*, 86 F. 868; *Paschen v. U. S.*, 70 F. 2d 491.

The usual contention on behalf of a defendant in this type of case is that the unexplained increase in net worth results from expenditure of funds accumulated and secreted in earlier years, for which tax prosecutions are then barred by the statute of limitations. Obviously, because of the difficulty and inaccessibility of such proof, the Government could not possibly wholly rebut such a contention, as only the defendant himself knows whether the defense is made [fol. 361] in good faith. In such instances, after the Government has offered all proof available, the defendant should not be permitted to stand silently by and thwart a conviction on the claim that a failure to prove unknown assets does not satisfy net worth requirements. Manifestly, the true and good faith of such a defense is for the jury alone. *Malone v. U. S.*, 94 F. 2d 281, 288; *Guzik v. U. S.*, 54 F. 2d 618, 620; *Oliver v. U. S.*, 54 F. 2d 48, 50; *U. S. v. Johnson*, 319 U. S. 503.

The evidence here is amply sufficient to justify the verdict, on the authority of *U. S. v. Chapman*, 168 F. 2d 997, and *Barrow v. U. S.*, 171 F. 2d 287. In any event, the conviction should be sustained on the alternative theory that abundant proof of the defendant's large purchases, investments and expenditures during the tax period in question properly presented a jury issue as to whether he had willfully failed to report taxable income, for the reason that a jury may properly infer from such transactions that the defendant had taxable income with which to make his proven disbursements. *U. S. v. Johnson*, 319 U. S. 503, 517; *O'Brien v. U. S.*, 51 F. 2d 193; *U. S. v. Miro*, 60 F. 2d 58. This method of proving taxable income was sanctioned by our court of last resort in *U. S. v. Johnson*, 319 U. S. 503, at p. 517, wherein it was stated:

"That he (defendant) had large, unreported income was reinforced by proof which warranted the jury in finding that certainly for the years 1937, 1938, and 1939, the private expenditures of Johnson exceeded his available declared resources. It is on this latter ground—namely, that presumably Johnson's expenditures justified the finding that he had some unreported income



[fol. 362] which was properly attributable to his earnings from the gambling houses—that the court below thought that the evidence \* \* \* was sufficient to go to the jury. That is enough to sustain the judgment against Johnson \* \* \* .”

Moreover, in the recent case of *Barrow v. U. S.*, 171 F. 2d 286, this court stated:

“We think the Government presented evidence showing that the making and the filing of the returns by the Defendant were with knowledge that the amount of his gross sales was therein largely understated, and that the returns were made and filed after Defendant had been informed by his accountant of the true amount of such gross sales. Such evidence, we think, was sufficient to make out a prima facie case under the indictment, and thereafter it was not the burden of the United States to make proof of facts which Defendant knew or should have known, relating to the amount of his profits and net income for such years.”

It is without dispute that the defendant's income from his gambling resorts, night clubs, and other nefarious enterprises mounted into the hundreds of thousands of dollars. He alone knew the naked facts concerning the operation of his illegal businesses, and the income derived therefrom, but he refused to take the witness stand and testify, claiming his constitutional right. This record stands complete without one shred of credible evidence in his favor. Furthermore, he had the affrontery to request two bills of particulars as to the charges against him, and in effect said to his [fol. 363] Government that “while I know every detail of my crooked business, you must tell me what you know”; and now the majority opinion launders him white and he goes without a day.

I respectfully dissent.

[fol. 364]

## JUDGMENT

Extract from the Minutes of May 13th, 1949

No. 12456

J. BAKER BRYAN, SR.,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial.

"McCord, Circuit Judge, dissents."

[fols. 365-368] MOTION TO AMEND JUDGMENT TO CONFORM TO  
RULE 29 (a) OF FEDERAL RULES OF CRIMINAL PROCEDURE—  
Filed June 2, 1949

IN THE  
**United States Court of Appeals**  
FOR THE FIFTH CIRCUIT

\_\_\_\_\_  
No. 12456  
\_\_\_\_\_

J. BAKER BRYAN, SR., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

\_\_\_\_\_  
**MOTION TO AMEND JUDGMENT TO CONFORM TO  
RULE 29(a) OF FEDERAL RULES OF CRIMINAL  
PROCEDURE**  
\_\_\_\_\_

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW the appellant by his attorneys and moves the  
Court to amend its judgment of May 13, 1949, in the above-  
entitled cause and order a judgment of acquittal in order  
that the judgment may conform to Rule 29(a) of the Fed-  
eral Rules of Criminal Procedure, which reads as follows:

**RULE 29. MOTION FOR ACQUITTAL**

(a) *Motion for Judgment of Acquittal.* Motions for  
directed verdict are abolished and motions for judg-  
ment of acquittal shall be used in their place. The

court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

and gives as reasons therefor:

THAT this Court, on page 9 of the printed opinion, holds that the evidence—

“was insufficient to make out a *prima facie* case against the defendant on the net worth basis and the case should not have been submitted to the jury \* \* \*”;

THAT counsel for the appellant, at the conclusion of all the evidence of the trial, moved for a judgment of acquittal (Record 318), and that motion denied by the trial court should, as this Court now finds, have been granted;

THEREFORE, under Rule 29(a), the judgment of this Court should be that the judgment of the lower court is reversed and the cause remanded with directions to enter a judgment of acquittal. The rule was first discussed in *U. S. v. Bozza*, 155 Fed. 2d 592. In that case the indictment against the defendant was in five counts. He was convicted on all five counts. The Court of Appeals for the Third Circuit held that there was sufficient testimony to sustain the first, second and third counts but that the testimony was insufficient to sustain the fourth and fifth counts. It affirmed as to the first three counts and reversed and remanded for the entry of a judgment of acquittal on the fourth and fifth counts. Bozza took the case to the Supreme Court of the United States. See *Bozza v. U. S.*, 330 U. S. 160. The Supreme Court held that there was no sufficient evidence to sustain a conviction on counts two and three but held that



there was sufficient evidence to sustain the conviction on Count 1. It therefore reversed the Circuit Court of Appeals as to counts two and three but affirmed as to the first count. While it made no comment on the Circuit Court of Appeals handling of the fourth and fifth counts, it had the Court of Appeals opinion before it, knew the order that had been made on the fourth and fifth counts, knew that the Circuit Court of Appeals to be consistent would have to make the same order on the second and third counts. If it had disagreed with the order of the Court of Appeals as to the fourth and fifth counts, it would certainly have directed what sort of an order should be made as to the second and third counts because obviously the Court of Appeals would make the same order with reference to the second and third counts that it had made with reference to the fourth and fifth counts. Hence it is clear that while the Supreme Court did not discuss this procedure, it agreed with it.

Later cases from the Third Circuit are: *U. S. v. Renec Ice Cream Company*, 160 Fed. 2d 353, and *U. S. v. Johnson*, 165 Fed. 2d 42. Another case is *Karn v. U. S.*, 158 Fed. 2d 568 from the Ninth Circuit. The Court held that the testimony was insufficient to sustain a verdict of guilty and (text 573 and footnote) discussed at some length the order for remand. It ordered a judgment of acquittal. The Court says (col. 1, page 573):

"The right of appellant to a verdict of acquittal fully matured when he made his motion. To remand the case with directions to grant new trial would, in our judgment, be a serious invasion of rights which accrued to him in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind."

The Seventh Circuit has adopted the same procedure. See *U. S. v. Gardner*, 171 Fed. 2d 753, text 759.

THAT the evidence being insufficient to submit the matter to a jury, a remand for a new trial would place the appellant in double jeopardy in violation of his rights under the

Constitution, whereas the order of acquittal, as required under Rule 29(a), is necessary to do justice.

WHEREFORE, it is prayed that this motion be granted.

ALSTON COCKRELL

1105 Graham Building  
Jacksonville, Florida

JOHN W. MUSKOFF

1105 Graham Building  
Jacksonville, Florida

CARL J. BATTER

910 Seventeenth Street, N. W.  
Washington 6, D. C.  
*Attorneys for Appellant.*

[fol. 369] OPINION AND DISSENTING OPINION BY McCORD,  
CIRCUIT JUDGE, ON MOTION TO AMEND—Filed June 10,  
1949

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT

No. 12456

J. BAKER BRYAN, SR., Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for  
the Southern District of Florida

(June 10, 1949)

ON MOTION TO AMEND JUDGMENT

Before Sibley, McCord, and Waller, Circuit Judges

By the COURT:

On the appeal of the accused this court set aside the verdict and sentence and ordered a new trial. This was on the ground that the evidence presented did not authorize a verdict of guilty, one judge dissenting. The majority thinking the defect in the evidence might be supplied on another trial directed that it be had. The present motion is that we substitute a direction to enter a judgment of acquittal [fol. 370] because such a judgment is required by Rule 29 of Criminal Procedure, and by the constitutional provision against double jeopardy.

As to double jeopardy, the law is well settled that "Where the accused successfully seeks review of a conviction there is no double jeopardy upon a new trial". *Francis vs. Rebsweber*, 329 U. S. 459. "The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution." *Stroud vs. United States*, 251 U. S. 15, 18. Even when acquitted of a higher grade of

offense and convicted of a lower one on securing a new trial in an appellate court he waives the question of former jeopardy as to both grades; *Trono vs. United States*, 199 U. S. 521. "How far, if they had taken no steps to set aside the proceedings in the former case the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant who procures a judgment against him to be set aside may be tried anew upon the same indictment, or upon another indictment for the same offense of which he has been convicted." *United States vs. Ball*, 163 U. S. 662, 672.

As to Rule 29, the accused after verdict and within five days both renewed his motion for acquittal and moved for a new trial. In such a situation the rule provides, "If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter a judgment of acquittal". The district court refused to do either. The appellate court is not mentioned in the Rule. If we [fol. 371] are included in the expression "The court", our power to grant a new trial is stated therein. If we are not included, our power on finding error in the trial is as it has always been, to reverse and remand for further proceedings, which would mean a new trial, or we may "direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances". 28 U. S. C. A. §2106. This last we have done.

The acquittal under Counts 1 and 2 is of course final. There can be no further prosecution under those counts. *United States vs. Ball*, 163 U. S. 662.

Motion Denied.

McCord, Circuit Judge, dissenting:

In view of the language of the original majority opinion holding that under the evidence the defendant was entitled to a directed verdict, I am in no wise surprised that the defendant is now here again seeking an acquittal. His motion only accentuates the errors of the majority opinion, wherein the evidence pointed unerringly to his guilt. The conviction should have been affirmed.

I dissent.



[fol. 372] ORDER DENYING MOTION TO AMEND JUDGMENT

Extract from the Minutes of June 10, 1949

No. 12456

J. BAKER BRYAN, SR.

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the motion to amend the judgment filed in this cause be, and the same is hereby, denied.

“McCord, Circuit Judge, dissents.”

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[fol. 373] Clerk's Certificate to foregoing transcript omitted in printing.

(3111)



[fol. 368] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1949

No. 178

J. BAKER BRYAN, SR., Petitioner

VS.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4966)

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**FILED**

JUL 8 1949

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, ~~1948~~ 1949

No. 178

**178**

J. BAKER BRYAN, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT AND BRIEF IN SUPPORT  
THEREOF.**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1948.

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No.

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J. BAKER BRYAN, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT AND BRIEF IN SUPPORT  
THEREOF.**

---

*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The petitioner, J. Baker Bryan, Sr., by his undersigned attorneys, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the denial by that Court—entered in the above cause on June 10, 1949 (R. 365)—of a motion to amend the judgment entered on May 13, 1949 (R. 349).



### **Jurisdiction.**

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 1254 of the Judicial Code (Title 28 U. S. C. A.) as enacted June 25, 1948; and the petition is timely within the purview of Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

### **Summary Statement of the Matter Involved.**

The Circuit Court of Appeals for the Fifth Circuit in reversing a criminal conviction remanded this cause for a new trial. Your petitioner respectfully submits that instead of ordering a new trial, the holding of the appellate Court required it to order a judgment of acquittal; and the defense moved the Court to so amend its judgment. The Court denied this motion—we therefore apply for certiorari on the grounds hereinafter set forth.

The prior proceedings giving rise to the action of the appellate Court are as follows:

The petitioner was tried in the District Court of the United States for the Southern District of Florida under an indictment alleging that the petitioner filed false and fraudulent income tax returns for the years 1941, 1942, 1943, and 1944. The jury acquitted for the years 1941 and 1942 but convicted for the years 1943 and 1944.

At the close of the Government's case the defense moved the Court for a judgment of acquittal (R. 309, 310) and the Court denied the motion (R. 310). The defendant then presented its evidence; and, at the conclusion of all the testimony, the defense again moved the Court for a judgment of acquittal (R. 318). The Court denied the motion (R. 319).

After the jury returned its verdict the defense made a timely motion for a judgment of acquittal, and in the alternative moved the Court to grant a new trial (R. 18-21). The Court denied the motion (R. 23).

An appeal was filed in the United States Court of Appeals for the Fifth Circuit, and that Court, after argument

(R. 349) reversed the judgment of the District Court and remanded the cause for a new trial (R. 356) on the grounds that the evidence

“was insufficient to make out a *prima facie* case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury . . .” (R. 356).

Your petitioner then filed a motion requesting the Court to amend its judgment to conform to Rule 29(a) of the Federal Rules of Criminal Procedure (R. 361-364); that is, to order a judgment of acquittal, instead of a new trial, because that rule required the District Court to ~~so do~~

“if the evidence is insufficient to sustain a conviction of such offense or offenses.” (Rule 29(a).)

On June 10th the Court of Appeals denied your petitioner's motion (R. 365), ignoring Rule 29(a) and holding that Rule 29(b) sanctioned the granting of a new trial, assuming that the appellate Court is included in the rule; and if the rule does not apply to the appellate Court, then its judgment was authorized by Section 2106, Title 28 U. S. C. A.

The Court below wrote an opinion on the motion, which opinion begins as follows:

“On the appeal of the accused this Court set aside the verdict and sentence and ordered a new trial. This was on the ground that the evidence presented did not authorize a verdict of guilty, one judge dissenting. The majority thinking the defect in the evidence might be supplied on another trial directed that it be had.” (R. 365.)

Your petitioner's position is that the appellate Court, having determined that “the case should not have been submitted to the jury” (R. 356) and “that the evidence presented did not authorize a verdict of guilty” (R. 365), was required to do what the District Court should have done; that is, grant the motion for a judgment of acquittal

made at the conclusion of all the evidence (R. 318, 319)—to do otherwise would impose upon the defendant double jeopardy. Hence, from your petitioner's viewpoint, these are the

### **Questions Presented.**

1. Upon a holding that the evidence was insufficient for submission of the cause to a jury, and assuming the Federal Rules of Criminal Procedure inapplicable, can the Court order a new trial, or does justice require the entry of a judgment of acquittal?

2. Would not a new trial be a serious invasion of the rights which accrued to petitioner in the lower Court, and would it not strip away from him without just cause the real effectiveness of a reversal?

3. Would not a new trial upon a holding that the evidence was insufficient for submission of the cause to a jury place the defendant in double jeopardy?

4. Is the United States Court of Appeals "included" in the Federal Rules of Criminal Procedure, as stated in Rule 54, or is it excluded as the Fifth Circuit appears to believe?

5. If the Federal Rules of Criminal Procedure do not apply to the United States Court of Appeals, but Section 2106 of Title 28 U. S. C. A. does apply, then is a demand for a new trial "an appropriate judgment, decree or order" and "just" upon a holding by such Court that the evidence was insufficient for submission of the cause to a jury?

6. If the Federal Rules of Criminal Procedure are applicable to the United States Court of Appeals, has the Court an election upon a holding that the evidence was insufficient for submission of the cause to a jury to disregard Rule 29(a) and proceed under Rule 29(b)?

7. Was the appellate Court—in remanding the cause upon a holding that the evidence was insufficient for sub-



mission of the cause to the jury—required to do what the trial Judge would be required to do upon correctly ruling on the question of law presented by the motion for a judgment of acquittal; that is, order the entry of judgment of acquittal as required by Rule 29(a) of the Federal Rules of Criminal Procedure?

### **Reasons for Granting the Writ.**

1. The Court below has decided an important question of Federal appellate practice in a way that is in conflict with the applicable decisions of this Court. The Circuit Court in effect held that upon a holding that the evidence was insufficient for submission of the cause to a jury, it was within the discretion of the Court to order a new trial instead of ordering an entry of judgment of acquittal.

This Court in *Baltimore & Caroline Line, Inc. v. Redman* (1935) (295 U. S. 654), a civil case, after disposing of the propriety of reserving the question of law until after verdict, and affirming the finding of the Circuit Court that the evidence was insufficient to support the verdict, modified the Circuit Court's direction of a new trial; and, substituted a direction for a judgment of dismissal.

This Court in *Bozza v. U. S.* (1947) (330 U. S. 160) indirectly approved the entry of a judgment of acquittal upon a holding that the evidence was insufficient to sustain a conviction in a criminal case. The indictment involved five counts, and the Third Circuit affirmed on the first three counts and reversed and demanded for the entry of a judgment of acquittal on the fourth and fifth counts on the grounds that the testimony was insufficient to sustain a conviction (155 Fed. 2d 592). This Court in reversing as to counts two and three did not comment on the lower Court's handling of the fourth and fifth counts. The record was before this Court, and if this Court had not been satisfied with the lower Court's disposition of counts four and five, it is reasonable to assume it would have directed as to counts two and three a form of order differing from



the order the lower Court directed on counts four and five.

This Court in an opinion by an equally divided Court in *U. S. v. Stone* (1939) (308 U. S. 519) affirmed the Seventh Circuit (101 Fed. 2d 870) in a case where the trial Judge rendered judgment of dismissal, and the Government sought to substitute an order for a new trial—the Seventh Circuit denied the Government's petition for a writ of mandamus. Arising before the Federal Rules of Criminal Procedure this case presented other obstacles; nevertheless, judgment of dismissal was the proper remedy.

2. The Court below has rendered a decision in conflict with the decisions of the Third, Seventh, and Ninth Circuits on the same matter, as well as its former decisions. The Third Circuit in *U. S. v. Bozza* (*supra*) (155 Fed. 2d 592, 597), in *U. S. v. Renee Ice Cream Company* (160 Fed. 2d 353, 358), and in *U. S. v. Johnson* (165 Fed. 2d 42, 50) directed judgment of acquittal upon finding the evidence insufficient for submission of the cause to the jury. The Ninth Circuit in its opinion in *Karn v. U. S.* (158 Fed. 2d 568, 573) reviewed the subject of the kind of order to make on demand at some length and held that a judgment of acquittal was required. The Seventh Circuit adopted the same procedure in *U. S. v. Gardner* (171 Fed. 2d 753, 759).

The following three cases all arose in the Fifth Circuit:

In *Thomas v. U. S.* (162 Fed. 2d 301) two defendants were convicted. The Court held that the evidence was not sufficient to justify a conviction as to one of the defendants and reversed with directions to vacate the judgment against that defendant and discharge him. In *Sullivan v. U. S.* (161 Fed. 2d 629) the Court reversed the judgment of conviction with direction to acquit the defendant. In *Carothers v. U. S.* (161 Fed. 2d 716) the conviction on some counts in the indictment was affirmed. On other counts the case was reversed for new trial because of erroneous charges. On one count the conviction was reversed with directions to dismiss as to that count.

3. The Court below has rendered a decision that appears to cast doubt upon the applicability of the Federal Rules of Criminal Procedure to Circuit Courts despite the fact that Rule 54 expressly states that they apply to all criminal proceedings in the "United States circuit court of appeals"; whereas, the Third Circuit in *U. S. v. Bozza* (155 Fed. 2d 592, 597), *U. S. v. Renee Ice Cream Company* (160 Fed. 2d 353, 359), and *U. S. v. Johnson* (165 Fed. 2d 42, 50); the Ninth Circuit in *Karn v. U. S.* (158 Fed. 2d 568, 573); and the Seventh Circuit in *U. S. v. Gardner* (171 Fed. 2d 753, 759) expressly rely upon the said rules as authority for the entry of judgment of acquittal. The action of the Fifth Circuit, if not reviewed by this Court, will seriously affect the administration of justice and the application of the Federal Rules of Criminal Procedure before the Circuit Courts.

4. The Court below by relying on Section 2106 of Title 28 U. S. C. A. (R. 371) and by-passing the more specific requirements of Rule 29 of the Federal Rules of Criminal Procedure has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision; particularly in view of the fact that Section 3772 of Title 18 U. S. C. (Crimes and Criminal Procedure) which was approved the same day as Title 28 (Judiciary and Judicial Procedure), June 25, 1948, provides that nothing contained therein shall limit, supersede, or repeal existing rules.

5. The Court below by treating the motion made after verdict—that is, for judgment of acquittal or in the alternative a new trial (R. 18-21)—as one giving the Court an election, is in conflict with applicable decisions of this Court. In *Montgomery Ward & Co. v. Duncan* (1940) (311 U. S. 243) this Court held in passing on a similar rule under the Federal Rules of Civil Procedure (Rule 50(b)) that each motion is independent, and a litigant is entitled to a decision on the motion that disposes of the case.

6. The Court below by failing to pass upon the defendant's motion for judgment of acquittal made at the close of all the evidence (R. 318, 319), instead of acting upon and claiming discretionary power on the alternative motion made after verdict, departed from the accepted and usual course of judicial proceedings and calls for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all the proceedings of such Court of Appeals had in this cause, to the end that the motion and decision therein may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be modified; and that the petitioner be granted such other and further relief as may seem proper.

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## **BRIEF IN SUPPORT OF MOTION.**

### **Opinions Below.**

The decisions of the District Court for the Southern District of Florida on the three motions for judgment of acquittal are not supported by opinions, but the denials of the motions appear in the record at pages 310, 318 and 23. The opinion of the Court of Appeals on the appeal was rendered on May 13, 1949, (R. 349-359) and as of this date is unreported. The opinion of the Court of Appeals on the motion to amend the judgment was rendered on June 10, 1949 (R. 365-367) and is unreported as of this date.

### **Jurisdiction.**

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari by Section 1254 of the Judicial Code as enacted June 25, 1948, and this petition is filed within thirty days of the decision on the motion on which review is sought, as required by Rule 37(b)(2) of the Federal Rules of Criminal Procedure. The motion decided on June 10, 1949 (R. 365), was filed with the Court below on June 2, 1949 (R. 361), on a judgment entered on May 13, 1949 (R. 360).

The judgment was entered on May 13, 1949 (R. 360); and the motion to amend the judgment was filed within twenty-one days provided by Rule 32 of the Fifth Circuit covering the issuance of mandate. The motion was disposed of on June 10, 1949 (R. 365); and it is well settled that the time within which application may be made for review in this Court does not commence to run until after disposition of a motion seasonably filed and entertained. See *U. S. v. Seminole Nation* (299 U. S. 417, 421) and cases cited therein on motion for a new trial.

### **Statement of the Case.**

The principal facts are set forth in the petition at pages 2 to 3 under the title, "Summary Statement of the Matter Involved."



### Specification of Errors.

The United States Court of Appeals for the Fifth Circuit erred:

1. In denying the motion to amend the judgment to conform to Rule 29(a) of the Federal Rules of Criminal Procedure upon holding that the evidence was "insufficient to make out a *prima facie* case against the Defendant" (R. 356).
2. In holding that a new trial, instead of a judgment of acquittal, is an "appropriate" (Sec. 2106, Title 28, U. S. C. A.) and "just" (Sec. 2106, Title 28 U. S. C. A.) order upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356).
3. In failing to order that the motion for a judgment of acquittal made at the conclusion of all the testimony (R. 318) be granted, upon a holding that "the case should not have been submitted to the jury" (R. 356).
4. In holding that despite the holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356), it had an election to grant a new trial instead of a judgment of acquittal.
5. In relying on the authority granted in Section 2106 of Title 28 U. S. C. A., instead of the more specific direction stated in Rule 29(a) of the Federal Rules of Criminal Procedure.
6. In failing to order, upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356), what the trial Judge was required to order upon a similar holding; that is, the entry of a judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure.
7. In ordering a new trial, instead of a judgment of acquittal, on a holding "that the evidence presented did not authorize a verdict of guilty" (R. 365).

8. In "thinking the defect in the evidence might be supplied on another trial" (R. 365) to be an "appropriate" (Sec. 2106, Title 28 U. S. C. A.) and "just" (Sec. 2106, Title 28 U. S. C. A.) reason for ordering a new trial instead of a judgment of acquittal

9. In holding that the prosecution, having had its day in Court, and "the evidence presented did not authorize a verdict of guilty" (R. 365) was entitled to a new trial in order that "the defect in the evidence might be supplied on another trial" (R. 365).

10. In ordering a new trial, instead of a judgment of acquittal, because one judge dissented, upon a majority holding "that the evidence presented did not authorize a verdict of guilty" (R. 365) and the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 356).

11. In depriving the Defendant of the right to a judgment of acquittal which accrued to him at the close of all the evidence upon holdings that the evidence was "insufficient to make out a *prima facie* case against the defendant" (R. 356), that "the case should not have been submitted to the jury" (R. 356), and that "the evidence presented did not authorize a verdict of guilty" (R. 365).

### **The Statutes Involved.**

The statutes and rules of procedure involved are set forth in full in the Appendix, *infra*, pages 16-21.

## ARGUMENT.

### Summary.

The issue here appears to us a very simple and elementary proposition, and we shall endeavor to state the issue and the proper action as succinctly as possible.

The Court below had before it a review of the trial court proceedings and found that the trial court erroneously permitted the case to go to the jury because the evidence was insufficient to make out a *prima facie* case and that the evidence did not authorize a verdict of guilty. Had the trial court reached the same conclusion, it would have granted the Defendant's motion for a judgment of acquittal, and a *fortiori*, the Circuit Court is required to do what the trial court would have been required to do had it reached the correct conclusion; that is, enter a judgment of acquittal.

The Court below, instead of directing a judgment of acquittal, remanded the case with directions to have a new trial, with the thought that "the defect in the evidence might be supplied on another trial" (R. 365). Our position is that the ordering of a new trial instead of a judgment for acquittal is contrary to law and an abuse of judicial discretion.

### Point I.

#### **The Defendant's Right to a Judgment of Acquittal Matured When That Motion Was Made at the Close of All the Evidence.**

A motion for judgment of acquittal was made by counsel for the defense at the close of the Government's case (R. 309-310); and it set forth eight different reasons why the motion should be granted. The first three points are addressed to the insufficiency of the evidence; however, the trial judge denied the motion without granting counsel an opportunity to argue the motion (R. 310).

The defense then offered evidence and at the conclusion of all the testimony renewed the motion for judgment of acquittal in identical form (R. 318), and again the trial judge denied the motion (R. 319).

Thereafter, within the five days allowed, the defense renewed its motion for judgment of acquittal, and in the alternative, for a new trial (R. 18-21). The trial judge also denied that motion.

The Court of Appeals held that the evidence was insufficient to make out a *prima facie* case against the defendant (R. 358) and that the case should not have been submitted to the jury (R. 356). That being so, the Defendant's right to a judgment of acquittal matured when he made the motion at the close of all the evidence (R. 318), and Rule 29(a) of the Federal Rules of Criminal Procedure expressly directs that in that event a judgment of acquittal be entered. The rule set forth in the Appendix (B. 17) leaves no discretion to the court but expressly states that it "shall" order the entry of judgment of acquittal "if the evidence is insufficient to sustain a conviction."

The Court of Appeals in determining this case was *inter alia* passing upon the action of the trial judge, and it held that the trial judge should have found the evidence insufficient to make out a *prima facie* case and that the case should not have been submitted to the jury. That being so, the entry of judgment of acquittal should have been ordered.

## Point II.

### **The Court of Appeals is Governed by the Federal Rules of Criminal Procedure.**

The Court of Appeals appears to question whether the Rules are applicable to it. Rule 54 set forth in the Appendix (B. 18-20) in subsection (a)(1), expressly includes the Court of Appeals in the Courts to which these rules apply. We know of no other Court of Appeals that has questioned the applicability of the Rules; in fact, by act and discussion the Third, Seventh and Ninth Circuits have accepted such rules as being applicable, and this Court by indirection has likewise held the rules to be applicable to the Courts of Appeals.

The following cases all make reference to the rule and act pursuant to it.



*U. S. v. Bozza* (155 Fed. 2d 592) (3 CCA)

*U. S. v. Renee Ice Cream Company* (160 Fed. 2d.)  
(3 CCA)

*U. S. v. Johnson* (165 Fed. 2d 42) (3 CCA)

*Karn v. U. S.* (158 Fed 2d 568 (9 CCA)

*U. S. v. Gardner* (171 Fed. 2d 753) (7 CCA)

This Court in *Bozza v. U. S.* (330 U. S. 160) by failing to instruct the Third Circuit as to the form this Court's modification was to take, indirectly approved the Third Circuit's judgment of acquittal previously made on other counts.

### Point III.

#### **The Circuit Court's Application of Rule 29(b) is Improper.**

The Court of Appeals in its opinion on the motion disregards entirely subsection (a) of Rule 29 and relies entirely on subsection (b) as a basis for its election to order a new trial. The motion for judgment of acquittal made at the close of all the evidence (R. 318) was not waived by the subsequent motion in the alternative; nor did the motion in the alternative lodge in the court any discretion as to which motion it would grant.

The matter of a motion in the alternative was before this Court in *Montgomery Ward & Co. v. Duncan* (311 U. S. 243) in a civil case. The companion rule in Federal Rules of Civil Procedure (Rule 50) was before the Court, and it stated (p. 253):

"If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment."

This holding, carried to a logical conclusion, requires the Court of Appeals to rule on the motion for judgment of acquittal under Rule 29(a), and not to by-pass that subsection and determine that subsection (b) grants a discretion.

### Point IV.

#### Occasion for Judgment of Acquittal and New Trial Distinguished.

This Court in *Montgomery Ward & Co. v. Duncan* (311 U. S. 243, 251) had occasion to distinguish the grounds upon which a motion for judgment rests as contrasted to a motion for new trial. This was a civil case, and the counterpart of Rule 29 (Rule 50 of Federal Rules of Civil Procedure) was at issue. The Court said (p. 251):

"Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Obviously, pursuant to the foregoing holding the Court below had no choice under the holdings it made—that is, that the evidence was insufficient to make out a *prima facie* case, and that the case should not have gone to the jury—and it should have directed the entry of a judgment of acquittal.

#### Conclusion.

It is submitted that it is appropriate for this Court to correct the error of the Court of Appeals and that the writ should issue as prayed.

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## APPENDIX.

### Statutes and Rules of Procedure.

The pertinent statutes and Rules are Section 2106 of Title 28, U. S. C. A.; Section 3772 of Title 18, U. S. C. A.; Rules 1, 29 and 54 of the Federal Rules of Criminal Procedure; and Rule 32 of the Fifth Circuit.

#### The Statutes:

##### *Section 2106, Title 28, U. S. C. A.*

**Determination.** The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

*Section 3772, Title 18, U. S. C. A.* (the last paragraph is particularly pertinent)

**Procedure after verdict.** The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, District of Columbia, and Virgin Islands, in the Supreme Courts of Hawaii, and Puerto Rico, in the United States Circuit Courts of Appeals, in the United States Court of Appeals for the District of Columbia, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules



made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

## **The Federal Rules of Criminal Procedure:**

### ***Rule 1. Scope.***

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

### ***Rule 29. Motion for Acquittal.***

(a) ***Motion for Judgment of Acquittal.*** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) ***Reservation of Decision on Motion.*** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and



the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

*Rule 54.* (Subsection (a)(1) is particularly pertinent.)

### *Application and Exception*

#### *(a) Courts and Commissioners.*

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

#### *(b) Proceedings.*

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by section 102 of this title.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under section 392 of this title, and under section 23 of Title 50, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under sections 576-576d of Title 18, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under the Federal Juvenile Delinquency Act so far as they are inconsistent with that Act. They do not apply to summary trials for offenses against the navigation laws under sections 391-396 of Title 33, or to proceedings involving disputes between seamen under sections 256-258 of Title 22, or to proceedings for fishery offenses under the Act of June 28, 1937, sections 772-772i of Title 16, or to proceedings against a witness in a foreign country under sections 711-718 of Title 28.

(c) *Application of Terms.* As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District Court", includes all district courts named in subdivision (a), paragraph (i) of this rule. "Civil action" refers to a civil action in

a district court. "Oath" includes affirmations. "District judge" includes a justice of the District Court of the United States for the District of Columbia. "Judge of a circuit court of appeals" includes a justice of the United States Court of Appeals for the District of Columbia. "Senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States Attorney and an authorized assistant of a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

### **Rules—Fifth Circuit:**

#### **32. *Mandate.***

Mandate shall issue at any time after twenty-one days from the date of the decision, unless an application for rehearing has been granted or is pending. If such application is denied the mandate will be stayed for a further period of ten days. No further stay will be granted unless applied for within the delay given above. A mandate once issued will not be recalled except by the court and to prevent injustice. A copy of the opinion of this court shall accompany the mandate when a new trial or further proceedings are to be had in the lower court, and the charge for such copy shall be taxed in the costs of the case:

Provided, that in all cases entitled to precedence in this court, under section 7 of the act approved March 3, 1891, and amendments thereto, the mandate or other proper process shall issue after the expiration of seven days from the date of the decision, unless otherwise ordered by the court or one of the judges.

### **Federal Rules of Civil Procedure:**

#### **Rule 50. *Motion for a Directed Verdict.***

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that



the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1949

No. 178

J. BAKER BRYAN, SR.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

On Certiorari to the United States Court of Appeals  
for the Fifth Circuit

**BRIEF FOR PETITIONER**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1949

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No. 178

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J. BAKER BRYAN, SR.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Certiorari to the United States Court of Appeals  
for the Fifth Circuit

---

**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The decisions of the District Court for the Southern District of Florida on the three motions for judgment of acquittal are not supported by opinions; however, the denials of such motions appear in the record at pages 201, 206 and 14. The opinion of the Court of Appeals on the appeal was rendered on May 13, 1949 (R. 224-234) and is reported in 175 Fed. 2d, page 223. The opinion of the Court

of Appeals on the motion to amend the judgment was rendered on June 10, 1949 (R. 236-237) and is reported in 175 Fed. 2d, page 228, immediately following the decision on the appeal.

### **JURISDICTION**

The judgment of the Court of Appeals reversing and remanding for a new trial was entered May 13, 1949 (R. 235) (175 Fed. 2d 223); and, the order denying the petitioner's motion to amend the judgment was entered June 10, 1949 (R. 238) (175 Fed. 2d 228). The petition for certiorari was filed July 8, 1949 and certiorari granted on October 10, 1949. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Rule 37 of the Federal Rules of Criminal Procedure.

### **STATEMENT**

The issue before the Court is purely one of petitioner's rights arising out of the new procedure under the Federal Rules of Criminal Procedure and results from petitioner's motion to amend the judgment of the Court of Appeals for the Fifth Circuit substituting a judgment for acquittal for an order for a new trial and the denial of that motion. The petitioner sought and was granted certiorari on this single issue. The Government did not seek certiorari on any grounds.

In a criminal case, the Court below held that the evidence was insufficient to make out a *prima facie* case against the defendant and the case should not have been submitted to the jury (R. 231)—it therefore reversed and remanded for a new trial. Counsel for the defendant filed a motion to amend the judgment of remand so that it would provide for the entry of a judgment of acquittal instead of a new trial (R. 235a). The Court below denied this motion (R. 238), explaining that it ordered a new trial thinking that the insufficiency in the evidence might be cured on a new trial (R. 236). In ordering a new trial, the Court below

relied for its power to do so on Section 2106 of Title 28, U.S.C.A. (R. 237) and questioned whether Rule 29 of the Federal Rules of Criminal Procedure controlled its action; holding that, if it did, the power to grant a new trial was stated therein (R. 237).

The Court of Appeals for the Fifth Circuit had before it on appeal three motions that were denied by the trial court—one for judgment of acquittal under Rule 29(a) of the Federal Rules of Criminal Procedure, made at the close of the prosecution (R. 200-201); another for judgment of acquittal under the same rule (Rule 29(a)) made at the close of all the evidence (R. 206); and, a third motion for judgment of acquittal, or, in the alternative, a new trial made after verdict within the purview of Rule 29(b) (R. 11-13). A number of issues were raised on the appeal, some directed to a judgment of acquittal and others to a new trial. The Court below passed on only the one issue deeming it unnecessary to pass upon the other specifications of error.

The only issue before this Court is the action of the Appellate Court on your petitioner's motion to amend the judgment praying that it direct a judgment of acquittal in place of the direction for a new trial.

The position of your petitioner is that the Court below, having found that the evidence was insufficient to warrant the submission of the case to the jury, was required to do what the trial judge would have been compelled to do under Rule 29(a) of the Federal Rules of Criminal Procedure, had he ruled correctly on the motions for judgment of acquittal; or, if it be held that such rules do not govern the action of the appellate courts, then, the Appellate Court in denying petitioner's motion to direct a judgment of acquittal failed to direct an appropriate and just order as provided by Section 2106, Title 28, U.S.C.A.

## **SPECIFICATION OF ERRORS**

The United States Court of Appeals for the Fifth Circuit erred:

1. In denying the motion to amend the judgment to conform to Rule 29(a) of the Federal Rules of Criminal Procedure upon holding that the evidence was "insufficient to make out a *prima facie* case against the Defendant" (R. 236).

2. In holding that a new trial, instead of a judgment of acquittal, is an "appropriate" (Sec. 2106, Title 28, U.S.C.A.) and "just" (Sec. 2106, Title 28, U.S.C.A.) order upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231).

3. In failing to order that the motion for a judgment of acquittal made at the conclusion of all the testimony (R. 206) be granted, upon a holding that "the case should not have been submitted to the jury" (R. 231).

4. In holding that despite the holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231), it had an election to grant a new trial instead of a judgment of acquittal.

5. In relying on the authority granted in Section 2106 of Title 28 U.S.C.A., instead of the more specific direction stated in Rule 29(a) of the Federal Rules of Criminal Procedure.

6. In failing to order, upon a holding that the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231), what the trial judge was required to order upon a similar holding; that is, the entry of a judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure.

7. In ordering a new trial, instead of a judgment of acquittal, on a holding "that the evidence presented did not authorize a verdict of guilty" (R. 236).



8. In "thinking the defect in the evidence might be supplied on another trial" (R. 236) to be an "appropriate" (Sec. 2106, Title 28, U.S.C.A.) and "just" (Sec. 2106, Title 28, U.S.C.A.) reason for ordering a new trial instead of a judgment of acquittal.

9. In holding that the prosecution, having had its day in Court, and "the evidence presented did not authorize a verdict of guilty" (R. 236) was entitled to a new trial in order that "the defect in the evidence might be supplied on another trial" (R. 236).

10. In ordering a new trial, instead of a judgment of acquittal, one judge dissenting, upon a majority holding "that the evidence presented did not authorize a verdict of guilty" (R. 236) and the evidence "was insufficient to make out a *prima facie* case against the Defendant" (R. 231).

11. In depriving the Defendant of the right to a judgment of acquittal which accrued to him at the close of all the evidence upon holdings that the evidence was "insufficient to make out a *prima facie* case against the Defendant" (R. 231), that "the case should not have been submitted to the jury" (R. 231), and that "the evidence presented did not authorize a verdict of guilty" (R. 236).

12. In failing to protect the Defendant's rights under the Fifth Amendment to the Constitution by making an order that places him in double jeopardy.

## ARGUMENT

### Summary

There is but one issue before the Court and that is whether—upon findings by the Court of Appeals, that the evidence was insufficient to make out a *prima facie* case against the Defendant (R. 231); that the case should not have been submitted to the jury (R. 231); and, that the evidence presented did not authorize a verdict of guilty (R. 236)—the

Defendant is entitled to a judgment of acquittal, under Rule 29 of the Federal Rules of Criminal Procedure and Section 2106 of Title 28, U.S.C.A.; or, whether the Appellate Court can upon such findings restrict the relief to the Defendant to a new trial. The petitioner sought and was granted certiorari on this single issue—the Government did not seek certiorari on any grounds.

Our contentions are:

That there is a clear distinction between the basis for a new trial and a judgment of acquittal, the grounds for each being of a different character; and, where, as here, the Court finds that the case should not have been submitted to a jury (R. 231); the only "appropriate" and "just" judgment is a judgment of acquittal. This is true whether the Court acts under the Federal Rules of Criminal Procedure, or, under Section 2106 of Title 28, U.S.C.A. (Judiciary and Judicial Procedure); and

That the thought of the majority of the Court that the insufficiency in the evidence might be supplied in another trial (R. 236) is not a sufficient or valid reason for denying to the Defendant a judgment of acquittal. The prosecution has had its day in Court and has failed to make out a *prima facie* case. Why should it be permitted to try again? If it is permitted a second chance, why not a third, or fourth, or fifth chance? To give the prosecution another chance to supply additional evidence in the hope that it can make out a *prima facie* case would be intolerable—on such a theory a Defendant could be kept in Court defending himself for the rest of his life; and

That the function of the Court of Appeals in examining the record of a trial court is to correct the errors of the trial court and give to the Defendant the judgment that the trial court would have been required to give had it ruled correctly; and

That the Federal Rules of Criminal Procedure are applicable to the Court of Appeals by express language set forth in such rules; and

That the provisions of Section 2106 of Title 28, U.S.C.A. are not in conflict with the Federal Rules of Criminal Procedure; and, it would appear that they are no authority for the Court's mandate. However, the only appropriate and just judgment following a finding that the evidence is insufficient to sustain a verdict of guilty is a judgment of acquittal; and

That to require the Defendant to stand trial a second time subjects him to double jeopardy and is an invasion of his rights under the Fifth Amendment to the Constitution. Under the Federal Rules of Criminal Procedure, the right to a judgment of acquittal accrued to the Defendant before the jury began its deliberations. He did not waive that right by appealing from the ruling of the trial judge. Before these rules become effective, the power of the trial court was limited to directing the jury to acquit; and the Defendant waived the double jeopardy protection by his successful appeal. Now, however, under the Rules, he has a right that accrues to him, and he waives nothing by appealing—in fact he maintains and presses his right.

### **Point I**

#### **Distinction Between Grounds for a New Trial and Judgment of Acquittal**

The Court of Appeals in its opinion denying the petitioner's motion to amend the judgment begins with the following language (R. 236):

“On the appeal of the accused this court set aside the verdict and sentence and ordered a new trial. This was on the ground that the evidence presented did not authorize a verdict of guilty, one judge dissenting. The majority thinking the defect in the evidence might be supplied on another trial directed that it be had.”

We think that the holding that the evidence did not authorize a verdict of guilty leaves the Court no alternative but to remand the case with a direction to enter a judgment



of acquittal. The Court in its original opinion used the following language (R. 231):

“ \* \* \* the evidence, in the light of the bill of particulars, was insufficient to make out a *prima facie* case against the Defendant on the net worth-expenditure basis, and the case should not have been submitted to the jury \* \* \* ”

This Court in *Montgomery Ward & Co. v. Duncan* (311 U.S. 243, 251) had occasion to distinguish the grounds upon which a motion for judgment rests as contrasted to a motion for new trial. This was a civil case, and the counterpart of Rule 29 (Rule 50 of Federal Rules of Civil Procedure) was at issue. The Court said (p. 251):

“ Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; any may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.”

If the Court below had reversed the trial court for the refusal to grant a better bill of particulars; or, because the trial ended with but eleven jurors; or, on the grounds of admission of improper testimony; or, due to prejudicial remarks by Judge or Counsel; a new trial would have been a proper order. However, where, as here, the prosecution has failed to make out a case, there is but one remedy, and that is a judgment of acquittal.

Mr. Justice Minton, then a Justice of the Seventh Circuit, wrote the opinion of the Court in *United States v. Jones* (174 Fed. 2d 746), decided June 9, 1949. That case



involved a motion for discharge at the conclusion of all the evidence, and the Court treated the motion as the equivalent of a motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure. In its opinion the Court said (p. 749):

“There is a total failure of proof as to venue, and the motion ‘for discharge’ at the conclusion of all the evidence should have been sustained.”

and reversed the decision. No new trial was ordered, and none had been had. The text of the opinion clearly indicates the matter was closed by the reversal, and all parties appear to have accepted it as such.

The order to be made by the Appellate Court is not a matter of grace—once it establishes the basis for its reversal the appropriate and just order must follow. Its duty is to make such order as is required by the law and the facts, that is, a judgment of acquittal if, as here, the prosecution did not make out a case; or, a new trial if there has been other prejudicial error. We believe that under holdings such as we have in the case at bar, the only sound judicial order is a judgment of acquittal. Rule 29(a) of the Federal Rules of Criminal Procedure requires that it be done; and Section 2106 of Title 28, U.S.C.A., requires it as an appropriate and just judgment.

## **Point II**

### **Another Chance for the Prosecution Is Not Justice for the Defendant**

The sole reason for the Circuit Court's action in ordering a new trial is best expressed in its own words (R. 236):

“The majority thinking the defect in the evidence might be supplied on another trial directed that it be had.”

That seems a specious reason to deny the Defendant his due—a judgment of acquittal. Such reason is not sup-

ported by law or fact. The fact is that there was not sufficient evidence to warrant the submission of the case to the jury; the law is that the insufficiency of the evidence requires a judgment of acquittal (Rule 29(a) Federal Rules of Criminal Procedure).

The prosecution had its day in Court—it put forward such evidence as it had. That evidence proved insufficient to make out a *prima facie* case. Why, and by what principle of law can the prosecution be entitled to or hope for another attempt to patch up its case? What basis is there for the Circuit Court to “think” that the prosecution has evidence it did not see fit to introduce? Mere speculation has no province in the disposition of a criminal case involving a man’s liberty.

If, under the circumstances here prevailing, a new trial was to ensue, what is to prevent a third, or a fourth, or a fifth trial, etc. Is the prosecution upon being told it has not made out a case to be progressively given successive opportunities to make out a case? To direct attention to the possibility of successive trials is not idle talk—the same reasoning that prompts a second trial holds good for the demand for successive trials.

The Seventh Circuit had a somewhat similar problem to meet in *Ex Parte United States* (101 Fed. 2d 870) decided in 1939 before the Federal Rules of Criminal Procedure were in existence, affirmed by this Court by an evenly divided Court (308 U. S. 519). There, without the benefit of right established by the Rules, the Court was considering a petition for writ of mandamus, by the United States seeking to require the trial court to set aside two orders dismissing defendants and to direct new trials. The Court, speaking through Circuit Judge Kerner, said (p. 878):

“The essence of legal power is to take the case away from the jury, where there is an insufficiency of evidence to sustain a conviction. The power to direct a verdict and the power to render a judgment of dismissal pursuant to the reservation of the legal question are clearly incidental to, and necessarily flow from,

the judicial function of determining the legal sufficiency of the evidence. The court has inherent power to invoke these procedural aids in its effort to administer criminal justice."

and, after tracing the legal power, the Court goes on to say:

"To agree with petitioner that the prosecution is entitled to a new trial as a matter of right, after the issues have been fully tried in a trial by judge and jury and after the government has failed to prove its case against the defendants, is a monstrous penalty to impose upon the defendants."

In the above case the Court did not have the benefit of legislation as reflected in the Rules—still it had no difficulty in meeting the problem. It said:

"In substance there is no difference between a directed verdict of acquittal and a judgment of dismissal. It is only when the procedural change is fundamental and substantial injustice occurs that one of the litigants should be allowed to complain. In this case the Government, as well as the defendants in the criminal case, has a thoroughly considered ruling on an important legal question, which is exclusively within the province of the court."

The legal question was the insufficiency of the evidence and the Circuit Court denied the Government the petition for writ of mandamus. Here, in the case at bar, we also have the holding of insufficiency of the evidence and in addition Rule 29 providing for the proper relief—that is, judgment of acquittal.

### Point III

#### Function of Appellate Court

We believe it to be elementary that the function of an appellate court is to correct the errors of the trial court. If there be errors of sufficient importance to affect the result, than a reversal is in order. Upon reversing, the

grounds for such reversal control the nature of the remedy. We have heretofore quoted from *Montgomery Ward & Co. v. Duncan* (311 U.S. 234, 251) the difference in the state of facts that call for a new trial and those that call for a judgment of acquittal.

When an appellate court corrects a trial court, it orders done what the trial court would have been required to do had it ruled correctly. Here the trial court should have ruled that the evidence was insufficient and that the case should not be submitted to the jury. Had the trial court so ruled, it would have been required under Rule 29(a) to enter a judgment of acquittal. That rule requires a specific act by the trial judge—it is not permissive, it is mandatory. The pertinent part reads:

“The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction or such offense or offenses.”

Unless the appellate court will order the trial court to do what it would have been required to do, what purpose does the appeal serve? Assume *arguendo*, that the insufficiency of the evidence was the only issue on appeal. If the appellate court confined itself to the order of a new trial, and upon retrial the same evidence was again advanced, and the trial judge again acted incorrectly; upon the second appeal we would be right back where we started from—a stalemate. Certainly the appellate court can and must compel the trial court to do what the law (Rule 29) requires it to do by issuing an order for judgment of acquittal.

#### Point IV

#### Federal Rules of Criminal Procedure

The Circuit Court chooses to bottom its order on Section 2106 of Title 28, U.S.C.A., and does not consider Rule 29 applies to its action; but reasons that if it does, “the power to grant a new trial is stated therein.”



The Fifth Circuit is the only circuit that, to our knowledge, questions the applicability of the Federal Rules of Criminal Procedure. Three different circuits have followed Rule 29 without questioning its application to them. The Third, Seventh and Ninth Circuits have applied Rule 29 and this Court by indirection has applied the rule to an appellate court.

Rule 1 provides that these rules govern in the courts of the United States in all criminal proceedings with exceptions provided in Rule 54. Paragraph (a)(1) of Rule 54 includes the United States circuit courts of appeals in the list of courts to which these rules apply. Paragraph (b)(4) and (5) list the exceptions. They are petty offenses on federal reservations, extradition, forfeiture of property, collection of fines and penalties, offenses against the navigation laws, disputes between seamen, fishery offenses, or proceedings against a witness in a foreign country.

Rule 29 has been applied by the Third Circuit in *U. S. v. Bozza* (155 Fed. 2d 592); *U. S. v. Renee Ice Cream Co.* (160 Fed. 2d 353); and in *U. S. v. Johnson* (165 Fed. 2d 42). This Court in *Bozza v. U. S.* (330 U.S. 160), by failing to instruct the Third Circuit as to the form this Court's modification was to take, in effect has approved the Third Circuit's judgment of acquittal previously made on other counts.

The Seventh Circuit applied the rule in *U. S. v. Gardner* (171 Fed. 2d 753) and again very recently in *United States v. Jones* (174 Fed. 2d 746).

The Ninth Circuit in *Karn v. U. S.* (158 Fed. 2d 568) considered and applied the rule; and, explained its remand with judgment of acquittal as follows (p. 573):

"When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instructed the jury to render a verdict of acquittal. The right of appellant to a verdict of acquittal fully matured when he made his motion. To remand the case

with directions to grant new trial would, in our judgment, be a serious invasion of rights which accrued to him in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind. (See comment in *Ex Parte U. S.*)

"While adhering to the view that this court may remand the case with directions to discharge the appellant, we are also persuaded that Rule 29 of the Federal Rules of Criminal Procedure is properly applicable to this situation, even though the trial was held before the new criminal rules became effective, since this proceeding is 'pending' within the meaning of Rule 59. See *United States v. Bozza*, 3 Cir., 155 Fed. 2d 592, 596. This simplified procedure is suitable to the case at bar.

"The judgment of the district court is reversed and the cause remanded to the district court with directions to vacate the judgment of sentence herein and to enter a judgment of acquittal of the appellant."

Indubitably the rule does apply to the Courts of Appeal. However, the Circuit Court reasons that if the rule applies, then, the rule authorizes the granting of a new trial. In our opinion, there are two errors in that conclusion.

The first is that the holdings of the Court are not of the character that justify a new trial—the holdings of insufficiency of evidence require an acquittal.

Secondly, the motion that the Defendant in the case at bar is entitled to have corrected is the motion for judgment of acquittal made at the close of all the evidence (R. 206). The motion made after verdict (R. 11-13) for judgment of acquittal, or, in the alternative for a new trial is a subsequent motion and rests on the grounds that if the Appellate Court should hold that the grounds for a judgment of acquittal are not present; then, in that event the alternative motion for a new trial is urged. The Appellate Court has found that the evidence was insufficient to establish a *prima facie* case and that the case should not have been submitted to the jury. It did not pass on the errors directed to a new trial. The Appellate Court quite properly addressed itself

to the proper grounds—but those grounds call for a judgment of acquittal and the Defendant is entitled to a judgment of acquittal on the motion made to that end at the end of all the evidence (R. 206).

This Court in *Montgomery Ward & Co. v. Duncan* (311 U.S. 243) ruled on the priority of motions, stating at page 253:

“If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment.”

Rule 29 is divided into two parts: (a) Motion for Judgment of Acquittal and (b) Reservation of Decision on Motion. Subsection (a) makes no provision for a new trial—only judgment of acquittal. Here the trial court did not reserve its decision—it ruled promptly on the motion made at the conclusion of all the testimony (R. 206). Subsection (b) has no application to the motion made and ruled on at the conclusion of all the testimony—it comes into play only with the motion made in the alternative after verdict. •

Your petitioner is entitled to a judgment for acquittal based on the motion made at the conclusion of all the testimony; and, the Appellate Court is in error in bottoming its reasoning on the subsequent motion provided for in subsection (b), which is the only part of the rule that sanctions a new trial, providing the grounds of reversal are of the nature to justify a new trial instead of a judgment of acquittal.

### Point V

#### Section 2106, Though General, Likewise Requires a Judgment of Acquittal

The Court below rests its authority to grant a new trial on Section 2106 of Title 28 U.S.C.A. (Judiciary and Judicial Procedure) (R. 231).

Title 28, U.S.C.A. (Judiciary and Judicial Procedure) was enacted on June 25, 1948, and Section 2106 authorizes

the Court of Appeals to direct such judgment as may be appropriate and just. It was enacted on the same day that Title 18 (Crimes and Criminal Procedure) was enacted. Title 18, in the last paragraph of Section 3772, preserves intact the Federal Rules of Criminal Procedure and provides for such rules governing despite anything contained in Title 18, U.S.C.A.

Rule 29(a) of the Federal Rules of Criminal Procedure provides the appropriate and just judgment that should be entered upon a holding that the evidence is insufficient to sustain a conviction—that is a judgment of acquittal.

Assuming arguendo, that Rule 29(a) is not controlling before the Court of Appeals; nevertheless, the Court of Appeals is required to direct an appropriate and just judgment; and Rule 29(a) sets forth that judgment—a judgment of acquittal.

It has always been our understanding that where specific legislation — and the rules are legislation because they must be submitted to Congress before they became effective—is enacted, such legislation is controlling, rather than the legislation contained in a general statute.

Rule 29(a) is not inconsistent with Section 2106 of Title 28—it goes beyond the broad generalities set forth in Section 2106, and provides for a specific course of action. A judgment of acquittal is an appropriate and just judgment where the evidence is insufficient to sustain a conviction.

The only judgment the Court of Appeals can direct that is appropriate and just, is a judgment of acquittal.

## **Point VI**

### **Double Jeopardy**

To require the Defendant to again stand trial for an offense that was not established by the first trial is, in our opinion, subjecting him to double jeopardy and an invasion of his rights under the Fifth Amendment to the Constitution.



Under the law (Rule 29(a)) a judgment of acquittal accrued to him at the conclusion of all the evidence. The duty imposed upon the Judge is mandatory—it is not discretionary. He did not waive the right by his appeal—he urged it. Prior to the Federal Rules of Criminal Procedure, it may well be that in order to secure a reversal it was necessary to waive the double jeopardy protection; because, then, the power of the Court was limited to directing the jury to render a verdict of acquittal; and, an Appellate Court could remand for a new trial because it was the jury's function to bring in the verdict. Now, however, the legislation embraced in the Federal Rules of Criminal Procedure, more specifically Rule 29(a), specifically makes it the Judge's function to act, without the channel of a jury. There is no restriction on the Appellate Court in reviewing the trial judge's acts—it directs him to do what he should have done in the first instance. Here, that is a judgment of acquittal.

The Defendant urging a right that had accrued to him is entitled to an order granting him that right. To deny him that right and subject him to another trial is an invasion of his constitutional rights under the Fifth Amendment.

In urging this proposition, we are well aware of the decisions respecting double jeopardy; however, we believe they are all distinguishable by the advent of the Federal Rules of Criminal Procedure.

In the case at bar, the alternative motion for a new trial was made. It was denied by the trial court. The Court of Appeals did not have the right to reverse the trial court for denying the new trial. The only right the Court of Appeals had was to pass not on the question of the proper or improper exercise of the trial court's discretion but upon the question of whether the trial judge had or had not committed prejudicial error in his non-discretionary rulings. If the Court of Appeals had found that the trial court had committed error which entitled petitioner merely to a new trial, a reversal for a new trial would have

been proper. But having declined to pass on the points raised and argued which went to the question of errors which entitled petitioner to a new trial and having based its decision solely on the insufficiency of the evidence, it established that petitioner was entitled to an acquittal.

This Court in *Cone v. West Virginia Pulp & Paper Co.* (330 U.S. 212) (1947), discusses the discretion under analogous Civil Rule 50(b). The language of this Court's opinion demonstrates why the discretion is in the trial judge and not in the Appellate Court (page 215):

"Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court 'may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.' This 'either-or' language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See *Berry v. U. S.*, *supra*, 452-453. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March v. Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 418, 132 A. 355, 357; *Bunn v. Furstein*, 153 Pa. Super 637, 638, 34 A. 2d 924. See also *Yuttermann v. Sternberg*, 86 Fed. 2d 321, 324. Exercise of this dis-

cretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without delay, expense or other hardships of an appeal.' See *Greer v. Carpenter*, 323 Mo. 878, 882, 19 S. W. 2d 1046, 1047; Cf. *U. S. v. Johnson*, 327 U. S. 106, 112, 66 S. Ct. 464, 468."

Here, however, there was no discretion permitted to either court. The evidence was not sufficient to convict. Hence there was not discretion but mandatory duty in the court to acquit and there was an absolute right in petitioner to be acquitted. Neither court had the discretion to disregard that mandatory duty or to deprive petitioner of his absolute right.

On page 217 (Cone case) this Court makes clear why in a civil case the discretion should exist, namely, the right of the plaintiff to dismiss and begin over again. Since in a criminal case the government has no right to dismiss and begin over again once the defendant has been placed in jeopardy, it becomes plain why the criminal rule is different from the civil rule.

The strongest difference between the two rules is this. As this Court said in the Cone case, text 215:

"Rule 50(b) contains no language which absolutely requires the trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party."

Rule 50(a) contains no such requirements either. However, Criminal Rule 29 does contain such language, to wit:

"The court \* \* \* shall order the entry of judgment of acquittal \* \* \* if the evidence is insufficient to sustain a conviction \* \* \*"

In the Court of Appeals on the motion petitioner took the position that placing him on trial again would be to



subject him to double jeopardy. The Court of Appeals decided against petitioner. Petitioner raised the point again here.

The Fifth Amendment of the Constitution provides:

“ . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;  
 . . . ”

Petitioner was in jeopardy once. While in jeopardy he became entitled to an acquittal. To force him to another trial will put him in jeopardy again. Whatever arguments and refinements based on the law as it existed before the adoption of the rule may be made, the actual condition is that petitioner became entitled to a judgment of acquittal after being put in jeopardy; if he is again tried for the same offense, he will again be put in jeopardy.

The difference between the status before the adoption of the rule and since the adoption of the rule is shown we think by the case of *Stroud v. U. S.* (251 U.S. 15, text 18).

“The only thing the appellate court could do was to award a new trial on finding error in the proceeding, thus the plaintiff in error himself invoked the action of the court which resulted in a further trial. In such cases he is not placed in second jeopardy within the meaning of the Constitution.”

The rule completely changed this. The appellate court now can do something other than award a new trial. It can now require the judgment of acquittal to which petitioner became entitled.

The law seems to be plain that a second trial is double jeopardy. The constitutional provision against double jeopardy is one for the benefit of the petitioner in a criminal case. It confers a right which the defendant may waive. This, we think, was completely settled by the case of *Kepner v. U. S.* (195 U.S. 100).

The dissenting opinion of Mr. Justice Holmes emphasizes that a second trial is double jeopardy. He took the



adverse position, arguing that no question of waiver was involved while there was a second trial in the same case. He argued that there can be but one jeopardy in one case (195 U.S. 136).

Petitioner, of course, did not specifically and directly waive anything. The only question is, was there an implied waiver. The best that can be said for an implied waiver is that there was a conditional offer to waive. The offer at most could have been, in substance, only this:

If you find against me on my claim that I am entitled to a judgment of acquittal because no testimony sufficient to convict me was introduced but find for me on one or more of the other points which I have raised and which go only to my right to a new trial and you reverse only on one or more of these points, then I waive my constitutional right against being placed in jeopardy a second time.

The condition was not complied with, the offer was not accepted. Hence to decline to order the judgment of acquittal but to put defendant on trial a second time will be to deprive him of his constitutional right against double jeopardy, which right he has not only not waived but has insisted on at every stage since that right accrued to him.

The Court of Appeals, in deciding against petitioner on this point, cited four cases. The first was *State of Louisiana ex rel. Francis v. Resweber* (329 U.S. 459). This case did not involve Rule 29. In fact, it did not even involve a second trial. The question there was only of a second electrocution. The other three cases cited are *Stroud v. U. S.* (251 U. S. 15), *Trono v. U. S.* (199 U. S. 521) and *Ball v. U. S.* (163 U. S. 662).

Rule 29 was adopted long after these cases were decided and hence was not involved. So far as the opinions show, the sufficiency of the evidence to convict was not the reason for reversal in the above cases. We submit that this case presents a new point that could not have been decided before the rule became effective.

Petitioner became entitled to a judgment of acquittal when (as the Court of Appeals decided) the government failed to make a case against him. He still has that right unless in some way he has lost it. Surely he did not lose his right because the trial judge erroneously deprived him of it, or, as we contend, the Court of Appeals erroneously deprived him of it. We know of no way by which he could lose the right except by waiving it. He has not waived it but has insisted on it at every stage. He made the motion for it both at the conclusion of the government's testimony and at the conclusion of all the testimony. When the judge ruled against him at the trial each time the motion was made and the jury found a verdict against him, he renewed the motion within the five days allowed by the rule.

It is true he also made the alternative motion for new trial provided by the rule. This was not a waiver. In the *Montgomery Ward* case, *supra*, this Court made this clear in passing on the analogous civil rule.

Petitioner insisted on his motion for judgment of acquittal in the Court of Appeals. When the Court of Appeals agreed with petitioner on the insufficiency of the evidence but reversed for a new trial, petitioner further insisted on his right to a judgment of acquittal by a motion in the Court of Appeals (R. 235a). When the Court of Appeals denied his motion petitioner further insisted on his right by his petition for certiorari to this Court. He is still insisting on that right.

Certainly he has not waived it. He is still entitled to it. We respectfully submit he should have it at the hands of this Court.

**CONCLUSION**

WHEREFORE, because of the errors herein mentioned, your petitioner respectfully prays that the judgment of the Court of Appeals for the Fifth Circuit be modified to direct a judgment of acquittal.

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## APPENDIX

### Statutes and Rules of Procedure

The pertinent statutes and rules are Section 2106 of Title 28, U.S.C.A.; Section 3772 of Title 18, U.S.C.A.; Rules 1, 29 and 54 of the Federal Rules of Criminal Procedure; and Rule 32 of the Fifth Circuit.

#### The Statutes:

##### *Section 2106, Title 28, U.S.C.A.*

*Determination.* The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

*Section 3772, Title 18, U.S.C.A.* (the last paragraph is particularly pertinent).

*Procedure after verdict.* The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, District of Columbia, and Virgin Islands, in the Supreme Courts of Hawaii, and Puerto Rico, in the United States Circuit Courts of Appeals, in the United States Court of Appeals for the District of Columbia, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for

and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

## **The Federal Rules of Criminal Procedure:**

### *Rule 1. Scope.*

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

### *Rule 29. Motion for Acquittal.*

(a) *Motion for Judgment of Acquittal.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.* If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may

be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

*Rule 54.* Subsection (a) (1) is particularly pertinent.)

*Application and Exception.*

(a) *Courts and Commissioners.*

(1) *Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit court of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) *Commissioners.* The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

(b). *Proceedings.*

(1) *Removed Proceedings.* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) *Offenses Outside a District or State.* These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by section 102 of this title.

(3) *Peace Bonds.* These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under section 392 of this title, and under section 23 of Title 50, but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) *Trials before Commissioners.* These rules do not apply to proceedings before United States commissioners and in the district courts under sections 576-576d of Title 18, relating to petty offenses on federal reservations.

(5) *Other Proceedings.* These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under the Federal Juvenile Delinquency Act so far as they are inconsistent with that Act. They do not apply to summary trials for offenses against the navigation laws under sections 391-396 of Title 33, or to proceedings involving disputes between seamen under sections 256-258 of Title 22, or to proceedings for fishery offenses under the Act of June 28, 1937, sections 772-772i of Title 16, or to proceedings against a witness in a foreign country under sections 711-718 of Title 28.

(c) *Application of Terms.* As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District Court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in a district court. "Oath" includes affirmations.



"District judge" includes a justice of the District Court of the United States for the District of Columbia. "Judge of a circuit court of appeals" includes a justice of the United States Court of Appeals for the District of Columbia. "Senior circuit judge" includes the chief justice of the United States Court of Appeals for the District of Columbia. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant to a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

## **Federal Rules of Civil Procedure:**

### *Rule 50. Motion for a Directed Verdict.*

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

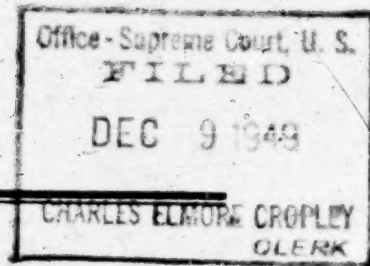
(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial

may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand and may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If not verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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IN THE  
**Supreme Court of the United States**

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October Term, 1949

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No. 178

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J. BAKER BRYAN, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

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On Certiorari to the United States Court of Appeals for the  
Fifth Circuit.

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**REPLY BRIEF FOR THE PETITIONER.**

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**REPLY BRIEF FOR THE PETITIONER.**

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The respondent in its brief urging the affirmance of the judgment by the court below, appears to rely upon the following points:

- I. That the judgment of the court below does not violate the petitioner's constitutional right against double jeopardy;



- II. That petitioner's right to a judgment of acquittal is a temporary right that rested solely in the judgment of the trial court, and that upon denial of the motion for judgment of acquittal by the trial court such right lapsed and reposed in the bosom of the court below a discretion not available to the trial court;
- III. That Rule 29(b) permits the trial court and the appellate court the same discretion that is contained in Rule 50(b) of the Federal Rules of Civil Procedure;
- IV. That a remand with direction for a new trial is "just" and "appropriate"—the language used in Section 2106, Title 28, U. S. C.—despite the mandate contained in Rule 29(a).

## I.

### Double Jeopardy.

The respondent cites numerous cases before and since the decision of this Court in *Trono v. United States*, 199 U. S. 521, decided in 1905, and quotes from that case in support of its position that there is no double jeopardy. However, a careful reading of the quoted language (Br. 11) at once makes it clear why that case and the whole line of decisions preceding and following it are not authority in the case at bar.

That double jeopardy exists on remand for a new trial is conceded by the line of decisions relied on by the respondent; however, it has been consistently held, as stated in the quotation:

"\* \* \* that by appeal he [the defendant] waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. \* \* \* " (Italics supplied)

The protection against double jeopardy is waived by seeking a new trial. Here, however, the facts are different.

The petitioner presented two pleas to the appellate court: one, for a review of the denial of the motion for judgment of acquittal; and the other for a new trial. The issues inherent in a new trial were not reached—the court below decided the case on the issue that would have resulted in a judgment of acquittal had the trial court correctly evaluated the evidence presented.

Prior to the Federal Rules of Criminal Procedure (effective March 21, 1946) it was considered the function of the jury to render a verdict, and the trial court could go no further than direct the jury to bring in a verdict of acquittal. Now, however, the trial court “shall” without the intervention of a jury, enter a judgment of acquittal “if the evidence is insufficient to sustain a conviction”. (Rule 29(a))

The distinction is obvious. Here, it was not necessary to ask the appellate court for a new trial—prior to the new rules it was. Here the action of the trial court on the motion for judgment of acquittal was presented for review, and that plea required no waiver of the constitutional rights—it did not require the asking for a new trial. The issue, under the rule, was out of the hands of the jury—the court was compelled to act.

Prior to the new rules, since the action was taken through the jury in the form of a directed verdict, the appellant had no recourse but to ask for a new trial and that involved a waiver of the constitutional right against double jeopardy.

The impediment heretofore existing on appeal has been vitiated by the rule compelling the court to enter a judgment of acquittal upon the finding that the evidence was insufficient to sustain a conviction. That finding is a matter of law and is reviewable. It has been reviewed and the trial court was found to have committed error. The remaining issues directed to a new trial were not reached—indeed it was not necessary to reach them in view of the decision reached by the court below.

It is significant that the respondent has not been able to point to a single case decided since the Federal Rules of Criminal Procedure became effective that follows the old line of decisions upon which it relies.

Double jeopardy exists and we rely on this Court to correct the error contained in the judgment of the court below.

## II.

### Judgment of Acquittal Not a Temporary Right.

The respondent appears to argue that petitioner's right under paragraph (a) of Rule 29 was a temporary right that lapsed upon the trial court committing error. He italicizes "if in the judgment of the trial court" in its brief (p. 26), although a perusal of the rule shows no such limitation. The rule, to the extent pertinent, reads:

"The court \* \* \* shall order the entry of judgment of acquittal \* \* \* if the evidence is insufficient to sustain a conviction of such offense \* \* \*."

The rule does not leave the matter to the discretion of the court—the word "shall" requires the court to enter a judgment of acquittal. The sufficiency or insufficiency of the evidence is a matter of law for the court to decide and a matter of law is reviewable. The rule does not, as the respondent argues, leave the matter to the "judgment of the trial court". If the rule were intended to be a rule applicable solely to the trial court it would have been easy enough to say so.

The Third, Seventh and Ninth Circuits have had no difficulty in following the rule and in each case have remanded with directions to enter a judgment of acquittal. *United States v. Bozza* (3 C. C. A.) 155 F. 2d 592, affirmed in part and reversed in part 330 U. S. 160; *United States v. Renee Ice Cream Co.* (3 C. C. A.) 160 F. 2d 353; *United States v. Johnson* (3 C. C. A.) 165 F. 2d 42, certiorari denied, 332 U. S. 852; *United States v. Gardner* (7 C. C. A.) 171 F. 2d 753; *Karn v. United States* (9 C. C. A.) 158 F.

2d 568. The respondent cannot point to a single case under the Federal Rules of Criminal Procedure where, upon reversal for insufficiency of the evidence, a new trial was had.

There is no indication whatsoever in the rule ~~that the~~ right to a judgment of acquittal is a temporary right that lapses upon the trial court's denial of the motion. There is no indication whatsoever that it is the judgment of the trial court alone that controls the right of the petitioner to a judgment of acquittal.

We submit that a reviewing court, upon finding the state of facts set forth in the rule, is bound by the positive action set forth in the rule just as much as is the trial court, and that the right to a judgment of acquittal is not lost if the reviewing court finds the facts set forth in the rule—that is, “if the evidence is insufficient to sustain a conviction of such offense”.

### III.

#### **Comparison of Rule 29(b) Federal Rules of Criminal Procedure with Rule 50(b) of the Federal Rules of Civil Procedure.**

The respondent points to Rule 50(b) of the Federal Rules of Civil Procedure and contends that that rule is in substance similar to Rule 29(b) of the Federal Rules of Criminal Procedure, and then quotes from this Court's decision in *Cone v. West Virginia Paper Co.*, 330 U. S. 212, construing that rule in a civil case (Br. 30).

The quotation from this Court's decision in *Cone v. West Virginia Paper Co.* (supra) appears to rest upon a discretion lodged in the court to choose between two alternatives. That the court has a discretion under Rule 50(b) is gleaned from the “either-or” language contained in the rule. No such language appears in Rule 29(b) and the discretion relied upon in the civil rule does not exist under the criminal rule. A comparison of the penultimate sentence in each rule follows:



**Civil Rule 50(b):**

"If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and *either* order a new trial *or* direct the entry of judgment as if the requested verdict had been directed." (Italics supplied)

**Criminal Rule 29(b):**

"If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal."

We do not think the criminal rule permits the discretion contained in the civil rule. It is to be borne in mind however that paragraph (b) of the rule requires consideration only if this Court should hold that the petitioner is not entitled to a judgment of acquittal under paragraph (a) of the rule.

#### IV.

#### **Is a New Trial "Just" and "Appropriate"?**

The respondent argues that the court below rendered a judgment that was both "just" and "appropriate" within the purview of Section 2106 of Title 28, U. S. C. Assuming arguendo, that the court below is correct in looking to that section for its authority, can it be said that a judgment that denies the petitioner the relief that would have been his had the trial court ruled correctly under Rule 29(a) is both just and appropriate? We think not.

The trial court, if it had ruled correctly on the motion for judgment of acquittal at the close of all the evidence (R. 206), would have been compelled under Rule 29(a) to enter a judgment of acquittal. Can any lesser relief be considered "just" and "appropriate" because the trial court committed error?

The right to a judgment of acquittal matured at the close of all the evidence. That right is the only "just" and "appropriate" right whether it be granted within the purview of Rule 29(a) or Section 2106 of Title 28, U. S. C.

**Conclusion.**

The respondent in its brief (pp. 10, 39) contends that it has additional evidence that can be produced at a new trial. Let us point out that the record is void of any such evidence or any reason why it was not advanced at the trial.

WHEREFORE, because of the errors committed, your petitioner respectfully prays that the judgment of the Court of Appeals for the Fifth Circuit be modified to direct a judgment of acquittal.

✓ Respectfully submitted,

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December 1949



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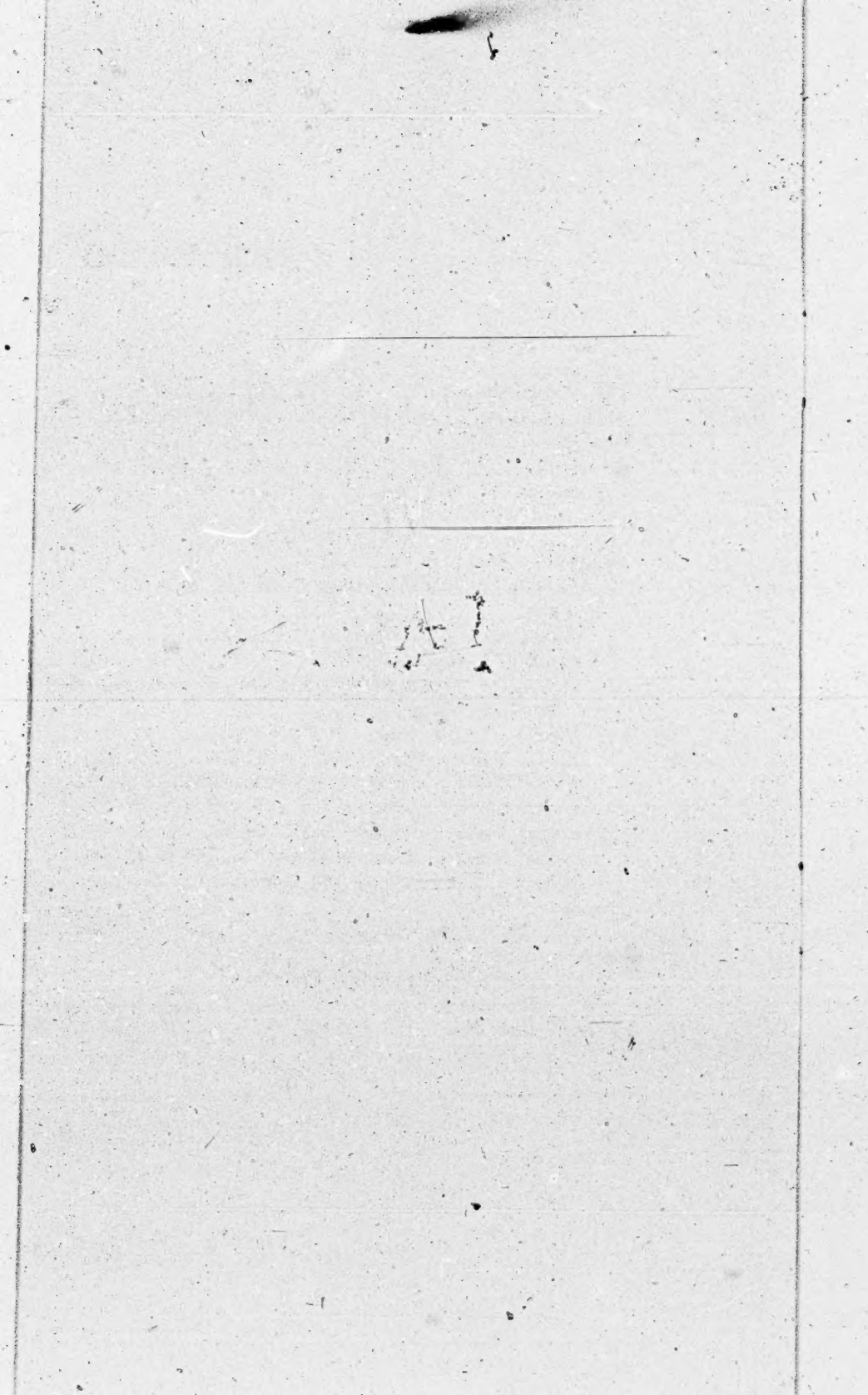
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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1949**

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**No. 178**

**J. BAKER BRYAN, SR., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## **MEMORANDUM FOR THE UNITED STATES**

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### **OPINIONS BELOW**

The District Court rendered no opinion. The opinions of the Court of Appeals, on reversal and remand for a new trial (R. 349-359) and on denial of petitioner's motion to amend the judgment (R. 365-366), are not yet reported.

### **JURISDICTION**

The judgment of the Court of Appeals reversing and remanding for a new trial was entered May 13, 1949 (R. 360), and the order denying petitioner's motion to amend the judgment was entered June 10, 1949 (R. 367). The petition for

a writ of certiorari was filed July 8, 1949. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

#### **QUESTION PRESENTED**

Whether the Court of Appeals, upon reversing a conviction on the ground that the evidence was insufficient to warrant submission of the case to the jury, is required to direct entry of a judgment of acquittal by the trial court.

#### **STATUTE AND RULES INVOLVED**

28 U. S. C.:

##### **Section 2106. DETERMINATION**

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

#### **Federal Rules of Criminal Procedure:**

##### **Rule 29. MOTION FOR ACQUITTAL.**

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indict-

ment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

**(b) Reservation of Decision on Motion.**

If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

**Rule 54. APPLICATION AND EXCEPTION.**

**(a) Courts and Commissioners.**

**(1) Courts.** These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the Dis-



trict Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

#### STATEMENT

After a trial by jury in the United States District Court for the Southern District of Florida (R. 32-336), petitioner was convicted (R. 32, 337-339) on the last two counts of a four-count indictment (R. 1-4) charging willful attempted income-tax evasion as to the years, 1941, 1942, 1943, and 1944, respectively, and was sentenced to imprisonment for two years on count three and to pay a fine of \$10,000 on count four (R. 337-339). The Court of Appeals for the Fifth Circuit, on May 13, 1949, reversed the conviction for insufficiency of the evidence and remanded the case for a new trial (R. 360), and thereafter, on June 10, 1949, denied (R. 367) petitioner's motion (R. 361-364) to amend the judgment of May 13 by directing the entry of a judgment of acquittal.

During the trial petitioner moved for a judgment of acquittal for the insufficiency of the evidence at the end of the Government's case and again at the end of the whole case, and in each

instance the court, without reserving opinion, denied the motion. (R. 309-310, 318-319.) Following the verdict (R. 32), petitioner renewed his motion for judgment of acquittal and in the alternative for a new trial (R. 18-21), which was also denied (R. 23).<sup>1</sup>

The Court of Appeals (one judge dissenting) was of the opinion that the Government has not established a *prima facie* case, since there was no evidence to exclude the possibility that certain expenditures relied upon as income might have come from funds accumulated in prior years (R. 356), and "thinking the defect in the evidence might be supplied on another trial directed that it be had" (R. 365).<sup>2</sup> Petitioner, by motion to amend the judgment, challenged the authority of the court to remand for a new trial under the circumstances (R. 361-364). The motion was denied (R. 367), the court considering its action fully sanctioned by Rule 29 (b), Federal Rules of

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<sup>1</sup> At this time the trial court also denied petitioner's motion in arrest of judgment (R. 22), based, *inter alia*, on the fact that one of the jurors had been improperly excused before verdict, by consent of counsel and the court during the trial, without written stipulation as required by Rule 23 (b) of the Federal Rules of Criminal Procedure. This point was raised on the appeal (R. 339-340), but was not reached (R. 356).

<sup>2</sup> The Government considered the evidence sufficient to sustain the verdict, but the fact that the case was submitted to a jury of eleven without full compliance with the requirement of Rule 23 (b) was one of the factors which impelled the decision not to petition for a writ of certiorari.

Criminal Procedure; if applicable, and in any event by the provisions of 28 U. S. C., Section 2106 (R. 365-367). —

#### DISCUSSION

Petitioner contends that when the Court of Appeals found the Government had not made out a *prima facie* case and that the case should not have been submitted to the jury, the appellate court was required to direct the trial court to enter a judgment of acquittal pursuant to the motion therefor made at the end of the whole case. (Pet. 4-5, 10-11.) He argues (Pet. 12-14) that such an order is expressly required by Rule 29 (a) of the Federal Rules of Criminal Procedure, *supra*, pp. 2-3, and that in any event remand for a new trial is not "appropriate" and "just" under the provisions of 28 U. S. C., Section 2106, *supra*, p. 2.

As the Court of Appeals pointed out (R. 366), Section 2106 empowers an appellate court, upon reversing a judgment, to "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as many be just under the circumstances." The remanding of the cause, as was done here, for a new trial wherein "the defect in the evidence might be supplied" (R. 365) was thus, we believe, clearly authorized by the statute, and merely "leaves the Government free to retry the case or to dismiss it" if the

necessary additional evidence is not obtainable. *Caringella v. United States*, 78 F. 2d 563, 567 (C. A. 7th); *Collenger v. United States*, 50 F. 2d 345, 346 (C. A. 7th), certiorari denied, 284 U. S. 654. This Court has heretofore recognized the propriety in a criminal case of remanding for a new trial, upon reversal for lack of sufficient evidence to establish all essential elements of the crime charged. *Wiborg v. United States*, 163 U. S. 632; *Clyatt v. United States*, 197 U. S. 207. It can hardly be said, therefore, that the action of the Court of Appeals in this case, as measured by the authority conferred in Section 2106, was "contrary to law and an abuse of judicial discretion." (Br. 12.)

With respect to the argument that the specific language in Rule 29 (a) is controlling and that a Court of Appeals, when it finds a case should not have been submitted to the jury, must direct the entry of judgment of acquittal, it appears that the Court of Appeals for the Ninth Circuit reached this conclusion in *Karn v. United States*, 158 F. 2d 568, 573, and that the Third Circuit may have followed the same reasoning in *United States v. Johnson*, 165 F. 2d 42, 48, and in *United States v. Rence Ice Cream Co.*, 160 F. 2d 353, 357-358.<sup>3</sup>

<sup>3</sup> Other cases relied upon by petitioner are distinguishable. Thus the Seventh Circuit, in *United States v. Gardner*, 171 F. 2d 753, 759, ordered entry of judgment of acquittal as being the procedure "authorized by the Rules of Criminal Proce-



We believe this interpretation of the rule is too narrow. The Government should not be denied an opportunity to supply additional evidence, if obtainable, and thus conform the proof to the law of the case as established by the appellate court for the retrial.<sup>4</sup> Neither should the Government, in endeavoring to sustain a conviction in the Court of Appeals, be precluded from taking advantage of evidence introduced on behalf of a defendant who elected to put in his evidence after the trial court had denied his motion for the judgment of acquittal.<sup>5</sup> But such a limitation would be a consequence of the construction sought by petitioner and apparently adopted by the Third and Ninth Circuits.

#### CONCLUSION

For the reasons stated we believe the order of the Court of Appeals denying petitioner's motion to

renew his motion for judgment of acquittal is "erroneous and reversible." The Third Circuit in *Bozza v. United States*, 155 F. 2d 592, affirmed, 330 U. S. 160, ordered entry of judgment of acquittal as being "both just and practicable."

<sup>4</sup> That there was some basis for the Government's belief that a prima facie case had been made out is indicated by comparing the decision in the instant case with that of this Court in *United States v. Johnson*, 319 U. S. 503.

<sup>5</sup> The Court of Appeals for the Second Circuit recently affirmed a conviction on finding, in the evidence introduced by defendant, corroborating circumstances required to establish perjury, even though the Government's case in chief contained no such proof and defendant had made a timely motion for judgment of acquittal before calling his witness. *United States v. Goldstein*, 168 F. 2d 666. In that case the court refused to recognize an absolute right to judgment of acquittal as having matured at the end of the Government's case.

amend the previous judgment by ordering the entry of a judgment of acquittal was correct. However, since the Courts of Appeals for the Third and Ninth Circuits seem to have reached a different conclusion\* and since an important question of federal appellate practice is involved, we do not oppose granting of the petition for a writ of certiorari.

Respectfully submitted,

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AUGUST, 1949.

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\* Although the Fifth Circuit in the instant case relied, in part, on the sanction in paragraph (b) of Rule 29, *supra*, we have not attempted to develop that point, since the effect of the decisions in the Third and Ninth Circuits is to make it immaterial whether the defendant properly challenges the sufficiency of the evidence at any time before appeal.



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# **In the Supreme Court of the United States**

OCTOBER TERM, 1949

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No. 178

**J. BAKER BRYAN, SR., PETITIONER**

**v.**

**THE UNITED STATES OF AMERICA**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES**

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## **OPINIONS BELOW**

The District Court rendered no opinion. The opinions of the Court of Appeals, on reversal and remand for a new trial (R. 224-234) and on denial of petitioner's motion to amend the judgment (R. 236-237), are reported at 175 F. 2d 223 and 229.

## **JURISDICTION**

The judgment of the Court of Appeals, reversing and remanding for a new trial, was entered on May 13, 1949 (R. 235), and the order denying petitioner's motion to amend the judgment was



entered on June 10, 1949 (R. 238). The petition for a writ of certiorari was filed on July 8, 1949, and was granted on October 10, 1949 (R. 239). The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

#### QUESTIONS PRESENTED

1. Whether the action of the court below in remanding for a new trial upon reversing petitioner's conviction violates petitioner's constitutional right not to be twice placed in jeopardy for the same offense.

2. Whether the court below, in reversing for insufficiency of the evidence to warrant submission of the case to the jury, had authority to remand for a new trial instead of directing the entry of a judgment of acquittal.

#### CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

Constitution of the United States, Fifth Amendment:

\* \* \* nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; \* \* \*

28 U. S. C.:

§ 2106. *Determination.*

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully

brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

### Federal Rules of Criminal Procedure:

**Rule 1. *Scope.*** These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

#### **Rule 29. *Motion for Acquittal.***

(a) ***Motion for Judgment of Acquittal.*** Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) ***Reservation of Decision on Motion.*** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the

motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

*Rule 54. Application and Exception.*

*(a) Courts and Commissioners.*

*(1) Courts.* These rules apply to all criminal proceedings in the district courts of the United States, which include the District Court of the United States for the District of Columbia, the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico and the District Court of the Virgin Islands; in the United States circuit courts of appeals, which include the United States Court of Appeals for the District of Columbia; and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

## STATEMENT

Petitioner was tried in the United States District Court for the Southern District of Florida on a four-count indictment charging that he wilfully attempted to evade income taxes in the years 1941, 1942, 1943 and 1944, respectively (R. 1-3). He was convicted on counts three and four (R. 20, 217), covering the years 1943 and 1944, and was sentenced to imprisonment for two years on count three and to pay a fine of \$10,000 on count four (R. 218-219).

During the trial, petitioner moved for a judgment of acquittal at the close of the Government's case for alleged insufficiency of the evidence (R. 200-201). The motion was denied (R. 201) and renewed at the close of the entire case (R. 206), when it was again denied (R. 206). Following the verdicts of guilty on counts three and four (R. 20), petitioner filed a motion for acquittal and in the alternative for a new trial (R. 11-13), based on the alleged insufficiency of the evidence and other asserted trial errors. The motion was denied<sup>1</sup> (R. 14-15).

On appeal, the Court of Appeals for the Fifth Circuit reversed the conviction for insufficiency

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<sup>1</sup> At the same time, the trial court denied petitioner's motion in arrest of judgment (R. 14) based, *inter alia*, on the fact that one of the jurors had been improperly excused before verdict, by consent of counsel and the court during the trial, without written stipulation as required by Rule 23 (b) of the Federal Rules of Criminal Procedure.



of the evidence (R. 224-231) and remanded for a new trial (R. 231, 235). The case had been tried on the "net worth-expenditures" theory of proof by the introduction of evidence designed to prove that petitioner's expenditures during the pertinent years exceeded his declared available cash resources, including his reported business income. The Court of Appeals agreed that the evidence showed that petitioner's expenditures in 1943 and 1944 were considerably more than his reported incomes for those years (R. 226) but, against the vigorous dissent of one judge (R. 231-234), held that the evidence was insufficient to make out a *prima facie* case on the "net worth-expenditures" theory of proof because the evidence did not exclude the hypothesis that the funds used in making some of the expenditures might have been funds accumulated in prior years (R. 231). The court, "thinking the defect in the evidence might be supplied on another trial directed that it be had" (R. 236).

Petitioner subsequently filed a motion in the Court of Appeals to amend the judgment of that court to direct the entry of a judgment of acquittal, asserting, as ground therefor, that the court was without authority to remand for a new trial (R. 236). The Court of Appeals denied the motion (R. 237-238) and it is the propriety of its

action in remanding for a new trial which is now before this Court.<sup>2</sup>

## SUMMARY OF ARGUMENT

### I

The rule is well established by decisions of this Court that where the accused successfully seeks review of a conviction there is no double jeopardy upon a new trial. This is usually put upon the ground that the defendant, by appealing, waives his right to claim once-in-jeopardy upon a new trial in the same case. Contrary to petitioner's contention, the advent of the Federal Rules of Criminal Procedure does not change the application of the rule here. Rule 29 authorizes the entry of judgment of acquittal after verdict, but petitioner cannot claim double jeopardy on the ground that he has insisted on a judgment of acquittal rather than waived it. The appeal itself constitutes the waiver and this Court has held that a defendant does not have the right to limit his waiver. That petitioner is in a less favorable position than he would have been had

<sup>2</sup> The Government considered the evidence sufficient to sustain the verdict but did not petition for a writ of certiorari. One reason was that the case was submitted to a jury of eleven without full compliance with the requirement of Rule 23 (b) of the Federal Rules of Criminal Procedure. See n. 1, *supra*, p. 5. This point was raised on the appeal (R. 219) but was not reached (R. 231).

the trial court taken the case from the jury is not a factor peculiar to this case; this Court has, in similar circumstances, denied the claim of double jeopardy.

## II

There is no merit in petitioner's contention that the court below was required to direct the entry of judgment of acquittal instead of remanding for a new trial. 28 U. S. C., Section 2106, authorized the court to remand the case and direct the entry of such appropriate judgment or to require such further proceedings to be had as were just under the circumstances. This section, which became effective September 1, 1948, represents no change in the power of the appellate courts on review, for they assuredly have never been authorized to remand and direct the entry of a judgment or require a further proceeding which was not "just" and "appropriate." Until recently, the appellate courts have consistently followed the practice of remanding for a new trial upon reversing for insufficiency of the evidence. Indeed, the appellate courts either did not have or did not exercise the power to direct the entry of judgment of acquittal.

In view of the long-standing practice of remanding for a new trial, it must be concluded that a remand for a new trial is "just" and "appropriate" and therefore authorized by 28 U. S. C.,

Section 2106, unless petitioner is correct in contending that Rule 29 of the Federal Rules of Criminal Procedure abrogates that power. Rule 29 does not do so. It merely constitutes a direction to the District Courts and revises prior procedure only to the extent of substituting a motion for judgment of acquittal in place of the former directed verdict and of permitting the District Courts to enter judgment of acquittal *after* verdict, a practice which had not been generally adopted prior to the rules and which had been of doubtful propriety. While the rule also appears to have the implied effect of authorizing the appellate courts to direct the entry of judgment of acquittal upon reversal if such a judgment is "just" and "appropriate" within the meaning of 28 U. S. C., Section 2106, the rule does not abrogate the power of the District Courts to grant a new trial for insufficiency of the evidence and therefore necessarily does not abrogate the power of the appellate courts to remand for a new trial upon reversing for insufficiency of the evidence.

The remand for a new trial in this case was not only therefore authorized by 28 U. S. C., Section 2106, but was the only judgment which the court below could properly have entered. Since remand for a new trial for insufficiency of the evidence has long been just and appropriate in any criminal case, it would appear that appellate



courts may appropriately direct the entry of judgment of acquittal only in an exceptional case, as where the record plainly shows, or the Government concedes, that no additional evidence is available. Certainly, when additional evidence is available, as here, no persuasive argument can be made that the Government should be foreclosed by an appellate court from establishing its case against a defendant whose guilt, even on what the appellate court deems to be insufficient evidence, was apparent enough for a jury to convict him. In the instant case, the majority thought "the defect in the evidence might be supplied on another trial" and the dissenting judge stated that the evidence of petitioner's guilt was overwhelming. It would therefore have been inappropriate and unjust from the standpoint of the fair administration of criminal justice for the court below to have entered judgment of acquittal and thereby set petitioner free and bar the Government from establishing its case against him.

#### ARGUMENT

##### I

THE ACTION OF THE COURT BELOW IN REMANDING FOR A NEW TRIAL UPON REVERSING PETITIONER'S CONVICTION DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT NOT TO BE TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE

The action of the court below in remanding for a new trial resulted from the court's reversal of

petitioner's conviction—a reversal which petitioner himself procured by appealing from the judgment of conviction against him. As this Court long ago stated in *Trono v. United States*, 199 U. S. 521, 533-534:

When the first trial is entered upon he [the defendant] is then put in jeopardy within the meaning of the phrase, and yet it has been held, as late as *United States v. Ball*, 163 U. S. 662, 671 (and nobody now doubts it), that if the judgment of conviction be reversed on his own appeal, he cannot avail himself of the once-in-jeopardy provision as a bar to a new trial of the offense of which he was convicted. And this is generally put upon the ground that by appeal he waives his right to the plea, and asks the court to award him a new trial, although its effect will be, if granted, that he will be again tried for the offense of which he has been once convicted. \* \* \*

See also, *United States v. Ball*, 163 U. S. 662, 671-672; *Brantley v. Georgia*, 217 U. S. 284; *Stroud v. United States*, 251 U. S. 15; *Hill v. Texas*, 316 U. S. 400, 406; *Francis v. Resweber*, 329 U. S. 459, 462. No distinction has ever been drawn between the application of this rule to reversals for insufficiency of the evidence and to reversals for other reasons. Indeed, it has long been a consistent and accepted practice of the appellate courts to remand for a new trial

upon reversing a conviction for insufficiency of the evidence. (See *infra*, pp. 17-20.)

Petitioner recognizes the authority of the above-mentioned decisions but asserts that they are "distinguishable by the advent of the Federal Rules of Criminal Procedure" (Br. 17). He argues that a new trial will place him in jeopardy a second time for the same offense because (1) neither the District Court nor the court below had discretion to disregard their "mandatory duty" to acquit him or to deprive him of his "absolute right" to acquittal (Br. 19) and (2) he has insisted upon his right to acquittal, rather than waived it (Br. 21-22).

Actually, these arguments raise no question of substance as to double jeopardy. They are based for the most part, and perhaps wholly, upon petitioner's contention that the court below had no power to remand for a new trial. For petitioner says that the Federal Rules of Criminal Procedure have worked a change in the power of the appellate court: while, before the Rules, an appellate court could do nothing but order a new trial, "it can now require the judgment of acquittal to which petitioner became entitled" (Br. 20). It follows, petitioner says, that while an appeal which, before the Federal Rules, could only eventuate in a new trial might be deemed a waiver of the right to an acquittal, an appeal under the Federal Rules, taken to vindicate the

right to an acquittal, cannot be treated as a waiver of that right. But the necessary premise for petitioner's conclusion is that under the Rules the appellate court must direct an acquittal. If petitioner is correct in this, no question of double jeopardy is reached.

If petitioner means to argue that he did not waive his right against double jeopardy even if the court below did have power to remand for a new trial, then the argument is answered by the decisions cited above. By appealing, petitioner necessarily invoked the jurisdiction of the court below to enter judgment upon reversal and he cannot be heard to say that he invoked the power of the court only to direct the entry of a judgment of acquittal. It is the appeal itself which constitutes the waiver of jeopardy and, as this Court specifically stated in *Trono v. United States*, 199 U. S. 521, a defendant does not have the right to limit his waiver as to jeopardy when



he appeals from a judgment against him. In that case it was held that, after acquittal of murder in the first degree and conviction and reversal of the conviction of assault, the defendant could be tried for murder in the second degree. Except for appealing from his conviction of the lesser offense, the defendant had taken no action which could be construed as a waiver of double jeopardy as to the higher offense. Nevertheless, it was held that the reversal of a judgment of conviction on the defendant's own appeal not only bars him from pleading once-in-jeopardy as a bar to a new trial of the offense of which he was convicted but also bars him from pleading once-in-jeopardy as to that part of the judgment which acquitted him.<sup>3</sup> It no more advances petitioner's case here than it did in *Trono* that, had the trial judge acted correctly in the first instance, petitioner would be better off than he now is.<sup>4</sup> Here, as there, the trial court's error and the necessity for appeal put petitioner in a worse position. But that detriment is not constitutionally objectionable. The pertinent rule is simply that, as the Court succinctly stated in *Francis v. Res-*

<sup>3</sup> However, a defendant who is acquitted and does not appeal may not be tried again for the same offense. *United States v. Ball*, 163 U. S. 662; *Kepner v. United States*, 195 U. S. 100.

<sup>4</sup> That is to say, with respect to the *Trono* case, if the lower court had acquitted the defendants of assault as the appellate court thought proper, and also acquitted the defendants of first degree murder, as the trial court had.

weber, 329 U. S. 459, 462, "where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." As a corollary, jeopardy in the same case is forbidden only if the new trial is at the instance of the Government. *Palko v. Connecticut*, 302 U. S. 319, 322-323; *Kepner v. United States*, 195 U. S. 100.

## II

THE COURT BELOW HAD POWER TO REMAND FOR A NEW TRIAL INSTEAD OF DIRECTING THE ENTRY OF A JUDGMENT OF ACQUITTAL

Petitioner contends that the court below had no power to remand for a new trial upon reversing his conviction for insufficiency of the evidence and was required to direct the entry of a judgment of acquittal (Br. 7-16). The contention is based upon an argument that Rule 29 (a) of the Federal Rules of Criminal Procedure (*supra*, pp. 3-4) imposed a mandatory duty upon the trial court to enter judgment of acquittal for insufficiency of the evidence and that the court below, upon holding the evidence insufficient to sustain petitioner's conviction, is required to do what the trial court should have done. In effect, petitioner is urging that the long accepted power of an appellate court to remand for a new trial has now been nullified by Rule 29 as to reversals for insufficiency of the evidence. It seems clear, however, that no such result was intended or effected

by the rule and that, on the contrary, the remand for a new trial was just and appropriate and thus authorized under the broad discretionary power conferred on the appellate courts by 28 U. S. C., Section 2106 (*supra*, pp. 2-3).

**A. THE REMAND FOR A NEW TRIAL WAS A "JUST" AND "APPROPRIATE" JUDGMENT AND THEREFORE AUTHORIZED BY 28 U. S. C., SECTION 2106, UNLESS THE POWER OF THE APPELLATE COURTS THEREUNDER HAS BEEN ABROGATED BY RULE 29 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

28 U. S. C., Section 2106 (*supra*, pp. 2-3), which became effective September 1, 1948 (Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Sec. 38), provides that this Court and any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and—

may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

This section is based upon three previous sections of Title 28 of the United States Code (Revisers' Notes, Section 2106, H. Rep. No. 308, 80th Cong., 1st Sess., p. A173), one of which had been in effect since the Circuit Courts of Appeals were established in 1891 and which contained a general direction to the appellate courts on review and

determination of cases. That section—Section 10 of the Act of March 3, 1891 (c. 517, 26 Stat. 829), formerly 28 U. S. C., Section 877—provided in effect that when a cause should be reviewed and determined by this Court or by a Court of Appeals “such cause shall be remanded” to the lower court “for further proceedings to be there taken in pursuance of such determination.” The revisers’ notes to 28 U. S. C., Section 2106, do not indicate that this general direction to the appellate courts was intended to be changed in any substantial respect by the change of phraseology in 28 U. S. C., Section 2106. Assuredly, in reviewing a decision of a lower court, an appellate court has never been authorized to enter or direct the entry of a judgment which was not “just” and “appropriate.”

There can be no doubt that, at least prior to the promulgation of the Federal Rules of Criminal Procedure, it was “just” and “appropriate” for an appellate court to remand for a new trial upon reversing a conviction for insufficiency of the evidence. A remand was “just”, since it did not offend against the constitutional prohibition against double jeopardy. (*Supra*, pp. 10–15.) A remand was also “appropriate” even though the reversal for insufficiency of the evidence necessarily meant that the trial court should have directed a verdict for the defend-



ant.\* Thus, in *Wiborg v. United States*, 163 U. S. 632, and again in *Clyatt v. United States*, 197 U. S. 207, this Court remanded for a new trial after holding that the evidence was insufficient to support the defendant's conviction. With recent exceptions, the several Courts of Appeals have quite consistently followed the same practice, at times specifically stating that the trial court should have directed a verdict for the defendant. See, e. g., *United States v. Di Genova*, 134 F. 2d 466 (C. A. 3d); *United States v. Russo*, 123 F. 2d 420 (C. A. 3d); *Pines v. United States*, 123 F. 2d 825 (C. A. 8th); *Backun v. United States*, 112 F. 2d 635 (C. A. 4th); *Carlingella v. United States*, 78 F. 2d 563 (C. A. 7th);

\* Before, as now under Rule 29 (a) of the Federal Rules of Criminal Procedure (*supra*, p. 3), the trial court was supposed to direct a verdict for the defendant if the evidence was insufficient to sustain a conviction. See, e. g., *Wiborg v. United States*, 163 U. S. 632, 659; *Hammond v. United States*, 127 F. 2d 752 (C. A. D. C.); *United States v. Di Genova*, 134 F. 2d 466 (C. A. 3d). Thus, the defendant could contend in the appellate court that "there is no substantial evidence in the record to support the judgment upon the verdict of guilty and that the motion of the defendants for an instructed verdict in their favor was erroneously denied" (*Abrams v. United States*, 250 U. S. 616, 619), in which event (*ibid.*)—

A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict.

Necessarily, therefore, a holding by the appellate court that the evidence was insufficient to sustain the conviction meant that the trial court should have directed a verdict for the defendant.

*Enrique Rivera v. United States*, 57 F. 2d 816 (C. A. 1st); *Collenger v. United States*, 50 F. 2d 345 (C. A. 7th), certiorari denied, 284 U. S. 654; *Leslie v. United States*, 43 F. 2d 288 (C. A. 10th); *Buhler v. United States*, 33 F. 2d 382 (C. A. 9th); *Ridenour v. United States*, 14 F. 2d 888 (C. A. 3d); *Yusem v. United States*, 8 F. 2d 6 (C. A. 3d); *Holmes v. United States*, 275 Fed. 49 (C. A. 4th); *Scoggins v. United States*, 255 Fed. 825 (C. A. 8th); *Duff v. United States*, 185 Fed. 101 (C. A. 4th).

These instances of remand for a new trial were not exceptional; on the contrary, up to comparatively recently, it has been assumed for the most part that the federal appellate courts had no power to direct the entry of a judgment of acquittal or discharge the defendant. Generally speaking, the rule has been that a reversal leaves the Government free to retry the case or to dismiss it if no additional evidence of the defendant's guilt is obtainable, as the Court of Appeals for the Seventh Circuit stated in *Caringella v. United States*, 78 F. 2d 563, 567.\* Only occasionally did

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\* This was true even though the appellate court did not expressly remand for a new trial. A new trial could be had upon a mere reversal when the mandate of the appellate court directed that such proceedings be had, in conformity with the judgment of the court, as according to right and justice and the laws of the United States ought to be had. 9 Cycl., Federal Procedure (1943), Sec. 4673; *Kosak v. United States*, 54 F. 2d 72 (C. A. 3d); *Steinman v. United States*, 185 Fed. 47 (C. A. 3d) cf. *Stroud v. United States*, 251 U. S. 15, 17.

the appellate courts direct the discharge of the defendant or dismiss the indictment and, in some of these cases, there were special circumstances which appeared to make such order appropriate.'

The general rule that a new trial could be ordered or had after a reversal for insufficiency of the evidence appears to have resulted from a consideration of the power of the trial courts after verdict. Even before the Federal Rules, the trial courts had statutory power to grant a new

<sup>1</sup> In *United States v. Bonanzi*, 94 F. 2d 570 (C. A. 2d), the Court of Appeals reversed and ordered the indictment dismissed where the evidence exclusive of illegally obtained evidence was insufficient to sustain the convictions. In a similar situation in *Klee v. United States*, 53 F. 2d 58 (C. A. 9th), the Court of Appeals ordered that the defendants be discharged. In *France v. United States*, 164 U. S. 676, this Court reversed and ordered the discharge of the defendants, but that case involved the construction of the statute under which the defendants were convicted and it was held that the evidence did not bring the defendants within the statute. In *Romano v. United States*, 9 F. 2d 522 (C. A. 2d), the court held the evidence insufficient and reversed with directions to dismiss the indictment. In *Cemonte v. United States*, 89 F. 2d 362 (C. A. 6th), where the evidence was also held to be insufficient, the court ordered the discharge of the defendant. In *United States v. Tatcher*, 131 F. 2d 1002, (C. A. 3d), the court reversed for insufficiency of the evidence and directed that the defendant be discharged. However, the Court of Appeals had previously found the evidence insufficient to support the defendant's conviction and had remanded for a new trial; on the second trial the defendant demurred to the evidence, the Government joined in the demurrer, the trial court discharged the jury, overruled the demurrer and found the defendant guilty; and the Court of Appeals, in finding the evidence insufficient and reversing

trial.<sup>6</sup> But they either did not have or did not generally exercise the power to enter a judgment of acquittal after verdict.<sup>7</sup> In civil cases, where the parties may move for judgment notwithstanding the verdict and there is common law precedent for the reservation by the trial court of his decision on a motion for a directed verdict, this Court has held that the courts of appeals have jurisdiction to reverse and remand for a new trial but

with directions to discharge the defendant, stated that it was following the common law practice in such a situation although it was not required to do so. In the previous case—*Tatcher v. United States*, 107 F. 2d 316 (C. A. 3d)—there was a demurrer to the evidence which was treated as a motion for a directed verdict and the Court of Appeals stated that it was bound to consider the judgment as having been entered upon the verdict of the jury. In that situation, the court stated that upon reversal for insufficiency of the evidence it could not adjudge the defendant not guilty but was required to direct a new trial.

<sup>6</sup> R. S. 726 (Act of Sept. 24, 1789, c. 20, sec. 17, 1 Stat. 83); reenacted as Section 269 of the Judicial Code (Act of March 3, 1911, c. 231, sec. 269, 36 Stat. 1163), formerly 28 U. S. C., Sec. 391, which was repealed by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess. The granting of a new trial is now authorized by Rule 33 of the Federal Rules of Criminal Procedure (following 18 U. S. C., Sec. 687).

<sup>7</sup> The question of the trial courts' power in criminal cases was before the Court in *United States v. Stone*, 308 U. S. 519, where there was an affirmance of the decision below (101 F. 2d 870 (C. A. 7th)) by an equally divided court. The Government contended that the trial court had no power in any event to enter a judgment of acquittal after verdict (see our brief, No. 48, October Term, 1939) but the facts were such that it might have been concluded that the trial court had reserved decision on the motions for directed verdicts.



are without power, consistently with the Seventh Amendment, to direct judgment notwithstanding the verdict in the absence of a proper motion in the trial court for such judgment or a reservation by the trial court of his decision on motion for a directed verdict.<sup>10</sup> *Slocum v. New York Life Ins. Co.*, 228 U. S. 364; *Baltimore & C. Line v. Redman*, 295 U. S. 654; *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389. The appellate courts' power after verdict is therefore no greater than the trial courts'. By analogy to the civil cases, the appellate courts in criminal cases have found themselves powerless to direct the entry of judgment of acquittal after verdict at least in the absence of a motion for such judgment after verdict or a reservation by the trial court of his decision on the motion for a directed verdict. Thus, in *Collenger v. United States*, 50 F. 2d 345 (C. A. 7th), certiorari denied, 284 U. S. 654, where the evidence was held insufficient to support the convictions and the defendants insisted that they be discharged because a verdict for their acquittal should have been directed by the trial court, it was held that this Court's decision in *Slocum v. New York Life Ins. Co.*, *supra*, required the direction of a new trial. And see cases cited, *supra*, this page.

<sup>10</sup> The reservation of decision on the motion for a directed verdict in civil cases is now automatic under Rule 50 (b) of the Federal Rules of Civil Procedure (following 28 U. S. C., Sec. 723 (c)).

Under Rule 29 of the Federal Rules of Criminal Procedure (*supra*, pp. 3-4) the trial courts may now enter judgment of acquittal after verdict, at least on motion, and, accordingly, the appellate courts would seem to have power to direct the entry of a judgment of acquittal when such motion is made after verdict and provided such a judgment is "just" and "appropriate" so as to be authorized by 28 U. S. C., Section 2106. The question when such a judgment would be just and appropriate is discussed *infra*, pages 37-42.

At this point it is sufficient that the appellate practice of remanding for a new trial has in the past been regarded as both "just" and "appropriate." It follows that the court below had authority under 28 U. S. C., Section 2106, to remand this case for a new trial, provided Rule 29 of the criminal rules does not abrogate that power by making a remand inappropriate upon a reversal for insufficiency of the evidence.

**B. THE POWER OF THE COURT BELOW TO REMAND FOR A NEW TRIAL UNDER 28 U. S. C., SECTION 2106, IS NOT ABROGATED BY RULE 29 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

The Federal Rules of Criminal Procedure govern the procedure in criminal proceedings in the courts of the United States, including the Courts of Appeals and this Court (Rules 1 and 54, *supra*, pp. 3, 4). But Rule 29, *supra* (pp. 3-4) relates to procedure in the District Courts and does not

purport to state what a Court of Appeals may or must do on reversing a judgment of conviction for insufficiency of the evidence. Petitioner does not assert the contrary. His argument is that, since the court below held on appeal that the evidence was insufficient to sustain his conviction, the trial court should have entered a judgment of acquittal at the close of all the evidence as provided in Rule 29 (a) and that the court below must do what the trial court should have done. The argument rests on the premise that under Rule 29 (a) the right to a judgment of acquittal accrued to petitioner at the close of all the evidence in the trial court.

But if, as we shall show to be the case, no pertinent right accrued to petitioner under Rule 29 (a), *supra* (p. 3) which he did not have prior to the promulgation of the criminal rules, he is in no better position than the many defendants who were ordered to stand a second trial after reversal for insufficiency of evidence before the promulgation of the Federal Rules. See *supra*, pp. 18-20. The first sentence of paragraph (a) abolishes motions for directed verdict and substitutes motions for acquittal. The second sentence, upon which petitioner relies, provides:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is

closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This, of course, is a direction which is to be exercised according to the judgment of the trial court as to the sufficiency of the evidence. Prior to the promulgation of the rules, it was the duty of a trial court to direct a verdict in favor of the defendant if the evidence was insufficient to sustain a conviction. (See n. 5, *supra*, p. 18.) Accordingly, the quoted sentence is merely a statement of what was previously the rule, except that the trial court is to order the entry of a judgment of acquittal instead of directing a verdict. The Notes of the Advisory Committee on Rules for Criminal Procedure (S. Doc. No. 175, 79th Cong., 2d Sess., p. 50) state that the change in nomenclature does not modify the nature of the motion or enlarge the scope of matters that may be considered, and, as to the second sentence quoted above, simply state that it was patterned on Section 410 of the New York Code of Criminal Procedure." It is therefore evident that paragraph (a) was not designed to give a defendant any new substantive right. Cf. *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 250.

" Section 410 of the New York Code of Criminal Procedure provides:

If at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction of one or more of the crimes in the indictment or information, it may advise the jury to acquit the defendant thereof and they must follow the advice.



Accordingly, paragraph (a) does not support petitioner's contention that the right to a judgment of acquittal accrued to him at the close of all the evidence and must be enforced by the court below on appeal through direction of the entry of a judgment of acquittal. Petitioner's right under paragraph (a) is to a judgment of acquittal *if in the judgment of the trial court* the evidence is insufficient to sustain a conviction. That right, except from the standpoint of form, is the same as the previous right to a directed verdict which, as we have already shown (*supra*, pp. 17-20), did not preclude the appellate courts from remanding for a new trial upon reversing a conviction for insufficiency of the evidence.

Petitioner must therefore necessarily rely upon paragraph (b) of Rule 29 for his contention that the rule abrogates the power of the appellate courts to remand for a new trial upon reversing a conviction for insufficiency of the evidence. That paragraph authorizes the trial courts to reserve decision until after verdict on the motion for judgment of acquittal made at the close of all the evidence and, in case of denial of the motion, permits the defendant to renew his motion within five days after the jury is discharged and to include in the alternative a

motion for a new trial. The paragraph further provides:

If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

The Notes of the Advisory Committee on Rules for Criminal Procedure, *supra*, state that paragraph (b) is in substance similar to Rule 50 (b) of the Federal Rules of Civil Procedure (following 28 U. S. C., Sec. 723c) "and permits the court to render judgment for the defendant notwithstanding a verdict of guilty", that some federal courts have recognized and approved the use of a judgment *non obstante verdicto* for the defendant in a criminal case (citing *Ex parte United States*, 101 F. 2d 870 (C. A. 7th), affirmed by an equally divided court, *United States v. Stone*, 308 U. S. 519), and that "The rule sanctions this practice." The apparent purpose of paragraph (b), therefore, was merely to permit the trial courts to enter judgment of acquittal *after* verdict, a practice which had not been generally adopted prior to the rules and which had been of doubtful propriety.

Rule 29 (b) does not deprive the trial courts of any power which they previously could exercise after verdict. The rule recognizes the power

of the trial courts to grant a new trial by providing that on a motion made after verdict of guilty for judgment of acquittal or in the alternative for a new trial the trial court may "order a new trial or enter judgment of acquittal." Moreover, Rule 33 (following 18 U. S. C., Sec. 687) specifically authorizes the trial courts to graht a new trial.

The necessary conclusion is that after verdict the trial courts have power *either* to order a new trial or to enter judgment of acquittal *for insufficiency of the evidence*. Under Rule 33 a new trial may be granted for the usual reasons. One of those reasons is for insufficiency of the evidence to sustain the conviction. 9 Cycl., Federal Procedure (1943), Sec. 4499; Rapalje, *Criminal Procedure* (1889), Sec. 404; *United States v. Sorrentino*, 78 F. Supp. 425 (M. D. Pa.); *United States v. Robinson*, 71 F. Supp. 9 (D. D. C.); *United States v. Kaadt*, 31 F. Supp. 546 (N. D. Ind.). This is impliedly recognized by, and confirmed in, Rule 29, since that rule is concerned only with procedure with relation to the sufficiency of the evidence and provides that on a motion for judgment of acquittal or in the alternative for a new trial, the trial court may order a new trial or enter judgment of acquittal.<sup>12</sup>

<sup>12</sup> The granting of a new trial on grounds other than the insufficiency of the evidence is of course authorized by Rule 33. The rules also make provision for dismissal of the indictment or information. Rule 12 and 34.

The conclusion that after verdict the trial courts may either order a new trial or enter judgment of acquittal for insufficiency of the evidence is clear under decisions of this Court interpreting Rule 50 (b) of the Federal Rules of Civil Procedure (following 28 U. S. C., Sec. 723c). As already stated, the Notes of the Advisory Committee on Rules for Criminal Procedure, *supra*, state that Rule 29 (b) of the criminal rules is "in substance" similar to Rule 50 (b) of the civil rules. In *Cone v. West Virginia Paper Co.*, 330 U. S. 212, a civil case, the Court had before it the question whether under Rule 50 (b) of the civil rules a Court of Appeals is precluded from directing the entry of judgment for the defendant in the absence of a motion in the trial court for judgment notwithstanding the verdict. The case was a suit for damages for trespass and the Court of Appeals had directed the entry of judgment for the defendant after holding that there was prejudicial error in the admission of evidence to prove legal title and that the evidence of possession was insufficient to go to the jury. This Court held that the Court of Appeals could only remand for a new trial in the absence of a motion in the trial court for judgment notwithstanding the verdict. One of the reasons for the holding was that the trial court had a discretion to choose between directing a verdict and granting a new



trial and that the determination of which course should be pursued calls for the judgment in the first instance of the trial court, which is not available when the defendant has made no motion in the trial court for judgment notwithstanding the verdict. The following language of the opinion (p. 215) is particularly pertinent here:

Rule 50 (b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict *even though that court is persuaded that it erred in failing to direct a verdict for the losing party*. The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." This "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. *In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives.* \* \* \* [Italics supplied.]

See also, *Berry v. United States*, 312 U. S. 450, 452-453; *Globe Liquor Co. v. Son Roman*, 332 U. S. 571.

There can of course be no "discretion to choose between the two alternatives" if a judgment not-

withstanding the verdict is required for insufficiency of the evidence and a new trial may be granted only for errors other than the denial of the motion for a directed verdict. It would therefore seem futile for petitioner to argue, as he does by reference to *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (Br. 8, 14-15), a civil case, that under Rule 29 (b) the trial courts may grant a new trial only for errors other than the denial of the motion for judgment of acquittal made at the close of all the evidence.<sup>13</sup> Like Rule 50 (b) of the civil rules, Rule 29 (b) of the criminal rules provides that after verdict the trial court may either order a new trial or enter judgment of acquittal and nothing in the rule prohibits the trial court from exercising his discretion as between the two courses when he concludes that he erred in his judgment as to the sufficiency of the evidence and should have entered a judgment of acquittal at the close of all the evidence.<sup>14</sup>

<sup>13</sup> Petitioner refers to the separate "offices" of the motion for judgment and the motion for a new trial as stated in *Montgomery Ward & Co. v. Duncan*, *supra* (Br. 8), but that decision recognized that the two motions overlap to some extent.

<sup>14</sup> The fact that the trial court may also grant a new trial if it believes the verdict is against the weight of the evidence (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 248), does not, as petitioner seems to suggest (Br. 8), militate against the power to grant a new trial for insufficiency of the evidence to sustain the conviction.

Rule 29 (b) therefore refutes petitioner's contention that the right to a judgment of acquittal accrued to him at the close of all the evidence and must be directed by the court below on its reversal of his conviction for insufficiency of the evidence. The right which accrued to petitioner under paragraph (a) at the close of all the evidence was not the absolute right to a judgment of acquittal but the right to a judgment of acquittal if in the opinion of the trial court such a judgment should be entered. On appeal, the court below held that the evidence was insufficient to support petitioner's conviction, and thus that the trial court had erred in denying the motion for judgment of acquittal made at the close of all the evidence. The error, however, was one which, had the trial court been aware of it, could have been corrected by the trial court itself after verdict of guilty by either the entry of a judgment of acquittal or order for a new trial, the choice of which was entirely within its discretion and not even subject to review on appeal. Had the trial court granted a new trial, petitioner could not have appealed on the ground that his motion for judgment of acquittal should have been granted and, indeed, would have had no cause for complaint that the trial court had awarded him a new trial on his motion therefor for reasons which included the alleged insufficiency of the evidence. Since after the verdict of guilty the

trial court had power either to order a new trial or enter a judgment of acquittal for insufficiency of the evidence, there is no basis for an argument that only one course—the direction of entry of judgment of acquittal—was open to the court below upon reversing petitioner's conviction.

In this connection, it is pertinent to take note of the power of an appellate court in reversing for insufficiency of the evidence in a *civil* case. In situations where it is or formerly was proper for the trial court to enter judgment notwithstanding the verdict, the appellate courts had and have power to direct the entry of such a judgment upon reversal (*Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254; *Baltimore & C. Line v. Redman*, 295 U. S. 654) but were and are *not* required to do so (see *Stewart v. Southern Ry. Co.*, 315 U. S. 283; *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92; *Sammons v. Colonial Press*, 126 F. 2d 341, 349 (C. A. 1st)). Thus, for example, long ago in *St. Louis v. Western Union Telegraph Co.*, *supra*, the Court stated that in civil cases tried by the court rather than by jury, where all the facts are specifically found or agreed to, it is within the power of the appellate court, in reversing, to direct the judgment which shall be entered upon the findings, but that (p. 104)—

At the same time if for any reasons justice seems to require it, the court may simply reverse and direct a new trial.



To summarize, Rule 29 of the Federal Rules of Criminal Procedure is a procedural direction to the District Courts which varies previous procedure only to the extent of changing the nomenclature of the former motion for a directed verdict and of authorizing a District Court to enter judgment of acquittal *after* verdict. While the rule also appears to have the implied effect of authorizing the appellate courts to direct the entry of judgment of acquittal upon a reversal for insufficiency of the evidence if such a judgment is just and appropriate, the rule does not abrogate either the power of the District Courts to grant a new trial for insufficiency of the evidence or the long accepted power of the appellate courts to remand for a new trial upon reversing for insufficiency of the evidence.

In several recent cases, courts of appeals have directed the entry of a judgment of acquittal upon reversing a conviction for insufficiency of the evidence, but these cases furnish no persuasive argument in support of petitioner's position that the court below was *required* to direct the entry of a judgment of acquittal. In the following three cases the Court of Appeals for the Third Circuit remanded for entry of judgment of acquittal upon reversing for insufficiency of the evidence: *United States v. Bozza*, 155 F. 2d 592, affirmed in part and reversed in part, 330 U. S.

160;<sup>45</sup> *United States v. Renee Ice Cream Co.*, 160 F. 2d 353; *United States v. Johnson*, 165 F. 2d 42, certiorari denied, 332 U. S. 852. The Court of Appeals' action in the *Bozza* case was stated to be based upon Rule 29 of the criminal rules and to be "just and practicable." The *Renee Ice Cream* decision simply states (160 F. 2d at 357-358):

The conclusion we have reached is that the judgment must be reversed and the case remanded to the District Court with directions to enter a judgment of acquittal under Rule 29 (a) of Federal Rules of Criminal Procedure, relative to the Motion for Acquittal.

The *Johnson* decision states as follows (165 F. 2d at 50):

As to appellant, Miller Johnson, for reasons above stated, there must be a remand with directions to enter judgment of acquittal.

These three decisions show that the Third Circuit is of the opinion that it has authority to, and perhaps also that it is required to, direct the entry of judgment of acquittal upon reversing for insufficiency of the evidence. The decisions do not, however, reflect any valid reason for such a requirement. In *United States v. Gardner*, 171 F. 2d 753, the Court of Appeals for

<sup>45</sup> In the *Bozza* case, the counts of the indictment on which the Court of Appeals reversed were not before this Court.

the Seventh Circuit reversed for insufficiency of the evidence and remanded with directions for the entry of a judgment of acquittal, but only stated that such procedure was authorized (not required) by the Federal Rules of Criminal Procedure.<sup>16</sup> On the other hand, in *Karn v. United States*, 158 F. 2d 568 (C. A. 9th), while the court did not state that direction for entry of a judgment of acquittal is required, it did state that the trial judge should have instructed the jury to render a verdict of acquittal and that "The right of appellant to a verdict of acquittal fully matured when he made his motion" (p. 573).

C. REMAND FOR A NEW TRIAL WAS NOT ONLY A "JUST" AND "APPROPRIATE" JUDGMENT, AND THUS AUTHORIZED BY 28 U. S. C., SECTION 2106, BUT WAS THE ONLY JUDGMENT WHICH THE COURT BELOW COULD PROPERLY HAVE ENTERED

Petitioner's contention that the court below was required to direct the entry of a judgment of acquittal would seem to be answered fully by the fact that Rule 29 does not abrogate the long-standing practice and power of the appellate courts to remand for a new trial in reversing for insufficiency of the evidence. A remand for a new trial in any criminal case for insufficiency

<sup>16</sup> *United States v. Jones*, 174 F. 2d 746 (C. A. 7th), is also relied upon by petitioner (Br. 13). In that case, it was stated that "There is a total failure of proof as to venue, and the motion 'for discharge' at the conclusion of all the evidence should have been sustained" (p. 749), but the court merely reversed the judgment of the District Court.

of the evidence has long been accepted as both "just" and "appropriate," as we have shown (*supra*, pp. 16-20), and is therefore necessarily authorized by 28 U. S. C., Section 2106.

However, since there now seems to be no room for denying that the appellate courts also have power to direct the entry of a judgment of acquittal whenever such a judgment is "just" and "appropriate" (cf. *Gibson v. United States*, 329 U. S. 338, 350-351), the question arises as to when, if ever, the direction of entry of judgment of acquittal, rather than remand for a new trial, is "just" and "appropriate." If the question is left to the discretion of the Courts of Appeals, some circuits may adopt the practice of directing the entry of judgment of acquittal in all criminal cases reversed for insufficiency of the evidence, as the Third and Ninth Circuits appear already to have done, and the practice in the several circuits may vary. It is accordingly desirable that this Court state a rule for the guidance of the Courts of Appeals in this connection.

Since remand for a new trial has long been accepted as a just and appropriate judgment in any criminal case reversed for insufficiency of the evidence, it would appear that a direction for entry of judgment of acquittal would be a just and appropriate judgment only in an exceptional case. There is no compelling reason for a termination of a criminal case by judgment for the



defendant after a jury has once found the defendant guilty. In a civil case, where, unlike a criminal case, there is an appeal from the granting of a directed verdict, judgment on appeal can be given the party entitled to it upon evidence which as a whole establishes something so clearly as to leave no room to doubt what the fact is. Cf. *Gunning v. Cooley*, 281 U. S. 90, 94. A criminal case, on the other hand, is concerned with a determination of the defendant's guilt, and a reversal for insufficiency of the evidence after the trial court has denied judgment of acquittal and the jury has returned a verdict of guilty can hardly be taken to establish the innocence of the defendant. The interests of society demand that criminals be punished and the fair administration of justice requires that the Government have an opportunity to retry a defendant if evidence is available to supply the deficiency upon which the appellate court's reversal is based.

We submit, therefore, that the appellate courts should direct the entry of judgment of acquittal only in cases where it appears from the record, or the Government concedes, that no other evidence is available on a new trial.<sup>17</sup> That or a similar practice has been followed by many state courts having power to remand for a new trial or discharge the defendant.<sup>18</sup> The same result is of

<sup>17</sup> In the instant case, the Government does have additional evidence which can be introduced on a new trial.

<sup>18</sup> See e. g., Alabama: *Robison v. State*, 30 Ala. App. 12, certiorari denied, 240 Ala. 638; *Berry v. State*, 29 Ala. App.

course obtained by the present practice under which, upon reversal for insufficiency of the evidence, whether or not accompanied by an express remand for a new trial, the Government has an opportunity to retry the defendant but normally *nolle prosses* the indictment if no additional evidence is available for another trial. In the final analysis, therefore, there would seem to be no reason for abandoning the present practice.

If, on the other hand, the rule is to be that a determination of which type of judgment is "just" and "appropriate" must be made on the basis of the facts and circumstances of each case, the present case is still one in which remand for a new trial was the only "just" and "appropriate" judgment which could have been rendered by the court below. Petitioner was tried for and convicted of income tax evasion, of which

196. Connecticut: *State v. Newman*, 127 Conn. 398. Idaho: *State v. Bates*, 63 Idaho 119; *State v. Baker*, 60 Idaho 488. Illinois: *People v. Martin*, 380 Ill. 328; *People v. Younce*, 378 Ill. 307; *People v. Matter*, 378 Ill. 216; *People v. Bradley*, 375 Ill. 182; *People v. Samuels*, 366 Ill. 406; *People v. Burton*, 362 Ill. 157. Missouri: *State v. DeMoss*, 338 Mo. 719. Montana: *State v. Thomas*, 46 Mont. 468. New York: *People v. Baldiseno*, 266 App. Div. 909; *People v. Romano*, 253 App. Div. 724, affirmed, 277 N. Y. 619; *People v. Conlin*, 256 App. Div. 847. Oklahoma: *Anderson v. State*, 76 Okla. Cr. 280. Pennsylvania: *Commonwealth v. Bird*, 152 Pa. Super. 648. Texas: *Adamson v. State*, 145 Tex. Cr. 570. Virginia: *Sutherland v. Commonwealth*, 171 Va. 485; *Charles v. Commonwealth*, 184 Va. 63.

the Government offered evidence on the "net worth-expenditures" theory of proof. The reversal of the conviction on appeal for insufficiency of the evidence was by two of the three judges who sat in the case, Judge McCord having entered a vigorous dissent. The majority agreed that the evidence clearly showed that petitioner spent considerably more money during the pertinent years than his reported gross incomes for those years and that his capital assets were increased each year in proportion to expenditures in excess of gross receipts (R. 226). The reversal was on the ground that the evidence relative to petitioner's net assets at the beginning of the period in question was insufficient. Such evidence had been offered through the testimony of E. J. Marquis, Jr., an auditor for the Bureau of Internal Revenue (R. 173-199), who could not say with certainty that his audit of petitioner's assets at the beginning of the period contained all of petitioner's assets. Because of that fact (R. 230), the majority below concluded that (R. 231):

\* \* \* evidence \* \* \* did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income.

The Government thought that the requirements of proof on the "net worth-expenditures" theory

of proof had been supplied and had good reason for so thinking. See *United States v. Johnson*, 319 U. S. 503, 517, and Judge McCord's dissenting opinion herein (R. 231-234). A possible formal error in the conduct of the trial was considered to be a not insubstantial barrier to consideration of the ruling below by this Court on certiorari.<sup>19</sup> But even if that ruling were to be accepted by the Government, the Court which made it, because of what it called a "defect in the evidence" (R. 236), did in fact remand the case for a new trial. Not only did the majority think that the defect might be supplied on another trial (R. 236), but, as Judge McCord stated in dissenting (R. 231), "The overwhelming weight of the evidence in this case points unerringly to the guilt of this defendant." The public interest demands enforcement of the criminal laws, not release of accused persons on technical grounds, particularly after a jury has rendered a verdict of guilty and thus considered the evidence against the accused sufficient to establish his guilt beyond a reasonable doubt. In all the circumstances, therefore, it would have been neither just nor

<sup>19</sup> As previously stated, fn. 2, *supra*, p. 7, one of the reasons why the Government did not petition for a writ of certiorari in the case was that one of the jurors had been excused by consent of counsel and the court but without written stipulation as required by a literal reading of Rule 23 (b) of the Federal Rules of Criminal Procedure (following 28 U. S. C., Sec. 687).



appropriate for the court below to have directed the entry of a judgment of acquittal and thereby set petitioner free and prevent the Government from establishing its case against him.

#### CONCLUSION

The action of the court below in remanding for a new trial was proper and should be affirmed.

Respectfully submitted,

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THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

JAMES M. McINERNEY,  
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DECEMBER 1949.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1949.

No. 178.

J. BAKER BRYAN, SR., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR REHEARING.**

CARL J. BATTER,  
910 Seventeenth Street, N. W.,  
Washington 6, D. C.  
*Attorney for the Petitioner.*





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**PETITION FOR REHEARING.**

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*To the Honorable the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

COMES NOW your petitioner, J. Baker Bryan, Sr., by his attorney, Carl J. Batter, and petitions this Court to grant a rehearing in the above-entitled cause, and as reasons therefor states as follows:

1. The opinion of this Court rests upon the motion made after verdict pursuant to Rule 29(b) of the Rules of Criminal Procedure, whereas in fact, that motion was not before this Court for review (Opinion pp. 7-8);

2. The only issue that gave this Court jurisdiction over the matter was the motion denied by the Court of Appeals addressed solely to Rule 29(a) and the motion before the trial court made at the conclusion of all the evidence (R. 235a, 236);

3. This Court has failed to decide whether the remand for a new trial on the motion addressed to the motion made at the close of all the evidence is a "just" and "appropriate" judgment;

4. In the absence of error by the trial court your petitioner would have procured a judgment of acquittal on the motion made at the close of all the evidence; and no lesser judgment on review of such motion can be considered "just" and "appropriate";

5. The review of the decision of the trial judge on the motion made at the close of all the evidence did not require a new trial as a remedy and the appeal is definitely divisible into items addressed to a new trial and those addressed to a review of that motion;

6. The point of double jeopardy, when viewed in the light of the motion made at the close of all the evidence, is clearly distinguishable from the cases relied upon by this Court in holding our contention in that respect, "not persuasive".

WHEREFORE, it is respectfully prayed that this petition be granted.

Respectfully submitted,

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CARL J. BATTER,  
910 Seventeenth Street, N. W.,  
Washington 6, D. C.  
*Attorney for the Petitioner.*

January, 1950.

### **Certificate of Counsel.**

Carl J. Batter, Counsel for Petitioner, hereby declares that the foregoing Petition for Rehearing is presented in good faith and not for delay; and that the failure to grant such petition will leave the issue presented by the granting of the writ of certiorari undecided.

CARL J. BATTER.